Last reviewed and edited December 4, 2013
Including amendments effective January 1, 2014

MAINE RULES OF CRIMINAL PROCEDURE

(with Advisory Committee Notes)

This document contains the Maine Rules of Criminal Procedure including amendments through those adopted October 28, 2013, and effective January 1, 2014. Following each rule are advisory committee notes for amendments that have been adopted since the original adoption of these rules, effective December 1, 1965. The advisory committee notes describe the reasons for rule amendments, sometimes in considerable detail. Advisory committee notes are not included for rules that have been completely abrogated after the amendment addressed by the note and for minor technical changes to some rules. The word version of this document contains a hyperlink feature allowing transfer to the indicated rule from a rule title that appears in blue in the List of Rules.

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I. SCOPE, PURPOSE, AND CONSTRUCTION

RULE 1. TITLE AND SCOPE OF RULES

RULE 1. TITLE AND SCOPE OF RULES

(a) Title. These rules may be known and cited as the Maine Rules of Criminal Procedure.

(b) Scope. These rules govern the procedure in the Superior Court and the District Court:

(1) In all criminal proceedings, including appellate and post-conviction review proceedings, extradition proceedings, proceedings on a post-conviction motion for DNA analysis, and proceedings on a post-judgment motion by a person whose identify allegedly has been stolen and falsely used; and

(2) In proceedings before justices of the peace and bail commissioners; and

(3) In juvenile crime proceedings (including appellate proceedings) to the extent consistent with the Maine Juvenile Code.

These rules are not applicable to forfeiture of property for a violation of a statute of the State of Maine or the collection of fines and penalties. These rules are not applicable to revocation proceedings under Title 17-A, sections 1205 through 1207, section 1233 or sections 1349-D through 1349-F except to the extent and under the conditions stated in those sections. These rules are not applicable to proceedings for administrative inspection warrants, traffic infractions, actions for license revocation or suspension, civil violations, search warrants for schedule Z drugs, and land use violations addressed in Rules 80E, 80F, 80G, 80H, 80I and 80K of the Maine Rules of Civil Procedure, except as those civil rules may reference or incorporate provisions of these rules.

(c) Procedure When None Specified. When no procedure is specifically prescribed the court shall proceed in any lawful manner not inconsistent with the

Constitution of the United States or of the State of Maine, these rules or any applicable statutes.

(d) Forms. Forms no longer accompany these rules. Forms are available through the courts and some forms that may be utilized by the public are available on the Maine Judicial Branch website.

(e) Effective Date of Amendments. Amendments to these rules will take effect on the day specified in the order adopting them. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when they take effect would not be feasible or would work injustice, in which event the former procedure applies.

Advisory Committee Note–1975

[M.R. Crim. P. 1.] This rule is amended to implement Maine Laws, 1975, Chapter 139, and to indicate that the Maine Rules of Criminal Procedure govern the proceedings on appeals from the District Court.

Advisory Committee Note–1976

[M.R. Crim. P. 1.] This amendment does not make any substantial change. It recognizes the abolition of the felony-misdemeanor distinction in the new Criminal Code, Title 17-A of the Maine Revised Statutes. The rule, as amended, establishes that the Maine Rules of Criminal Procedure govern the procedure in all criminal proceedings in all courts, except Class D and Class E crimes in the District Court. Those crimes are within the trial jurisdiction of the District Court, 17-A M.R.S.A. § 9(3), and procedure in those cases in the District Court is governed by the Maine District Court Criminal Rules.

Advisory Committee Note–1981

[M.R. Crim. P. 1.] The amendment conforms the terminology of the Rule with that presently found in 15 M.R.S.A. ch. 305-A.

Advisory Committee Note–1983

[M.R. Crim. P. 1.] The Amendment adds a reference to extradition proceedings.

Advisory Committee Note—1989

[M.R. Crim. P. 1.] Rule 1 collects a number of provisions now scattered throughout the rules which should come at the beginning.

Subdivision (a) contains the title of the rules; it was previously found in both [this Rule and] Rule 60.

Subdivision (b) details the scope of the rules, combining provisions previously found in both Rules 1 and both Rules 54.

Subdivision (c) authorizes judicial creativity when no procedure is specified, carrying forward provisions in both [this Rule and] Rules [sic] 58.

Subdivision (e) provides for the effective date of amendments, carrying forward the language of Rule 59(b).

Advisory Committee Note—1993

[M.R. Crim. P. 1(b).] Some question has arisen as to the applicability of the Maine Rules of Criminal Procedure to probation revocation proceedings. Since probation revocation proceedings are now comprehensively covered by statute, see Chapter 49 of Title 17-A, the better practice appears to be to make the rules selectively applicable only to the extent specified by statute. Moreover, the fragmentary provision contained in Rule 32(e) should be deleted once the corresponding change is made to the statute.

Advisory Committee Notes—2000

[M.R. Crim. P. 1(d).] This amendment is necessitated by the elimination of the Appendices of Forms to the Maine Rules of Criminal Procedure in favor of relying upon form preparation by the Judicial Branch Forms Committee and the Supreme Judicial Court to the extent the Court may choose to provide forms, particularly those relating to criminal practice in the Supreme Judicial Court. The elimination of the two appendices of forms to the Maine Rules of Criminal

Procedure is desirable both because of the small number of forms contained therein when compared with the total number of forms currently in use in criminal practice in the courts and because of the practical difficulties confronting the Supreme Judicial Court in making the necessary changes to keep the included forms current. The amendment, in addition to making clear that forms will no longer accompany the rules, explains that forms are currently available to users through the courts and will shortly be available on the Internet as well.

Advisory Committee Note—2002

[M.R. Crim. P. 1(b).] The amendment modifies the paragraph in two respects. First, it clarifies that the rules govern procedure where the Superior Court is sitting as an appellate court. Second, it eliminates from the scope of the rules any reference to the procedure where the Supreme Judicial Court is setting as the Law Court since that procedure is now in the Maine Rules of Appellate Procedure.

Advisory Committee Note—2003

[M.R. Crim. P. 1(b).] This amendment reconfigures the current rule in an effort to enhance clarity and readability. Further, two substantive changes have been made as well. First, the amendment incorporates the statutory change made by P.L. 1997, ch. 181, § 1 relative to extradition proceedings making them a District Court matter rather than a Superior Court matter. Second, the amendment adds post-conviction District Court and Superior Court proceedings relating to DNA analysis created by P.L. 2001, ch. 469, § 1, and incorporated into these rules in Part XII.

Advisory Committee Note—2004

[M.R. Crim. P. 1(b).] This amendment adds revocation proceedings relating to both supervised release, pursuant to 17-A M.R.S. § 1233, and administrative release, pursuant to 17-A M.R.S. § 1349-F, as proceedings to which the Maine Rules of Criminal Procedure are inapplicable except as specified in statute. *See also* Advisory Committee Note to M.R. Crim. P. 36(a), (b), (d) and (g).

Advisory Note - June 2006

M.R. Crim. P. 1(b). The amendment removes the division (i) and (ii) designations in the first sentence of the final paragraph as unnecessary. The

amendment also adds a reference to sections 1349-D and 1349-E in the second sentence of the final paragraph for purposes of completeness.

Advisory Note—July 2010

The amendment modifies subdivision (b) of Rule 1 in three respects. First, editing changes are made to eliminate duplicative language and the unnecessary distinctions between the Superior Court and the District Court. Those distinctions have been creating confusion and uncertainty in the many trial courts currently operating with combined Superior Court and District Court clerk's offices and the increasing number of courts operating with unified criminal dockets. As to the latter, see Administrative Order JB-08-2, *Establishment of the Cumberland County Unified Criminal Docket*, effective January 1, 2009, and Administrative Order JB-10-1, *Establishment of the Bangor Unified Criminal Docket*, effective January 4, 2010. These changes do not change statutory court authority in any way. For example, juvenile and extradition proceedings will continue to be heard as District Court matters; juvenile appeals will continue to be heard as Superior Court matters.

Second, the last paragraph of subdivision (b) is amended to eliminate another point of confusion by clarifying that the Maine Rules of Criminal Procedure do not govern proceedings for administrative inspection warrants, traffic infractions, actions for license revocation or suspension, civil violations, search warrants for schedule Z drugs, and land use violations addressed in Rules 80E, 80F, 80G, 80H, 80I and 80K of the Maine Rules of Civil Procedure, except as those civil rules may reference or incorporate provisions of these rules.

Third, a substantive change to subdivision (b) is necessitated by a recent statutory enactment. The amendment adds a reference to new Part XIII containing Rules 105-109, adopted by 2010 Me. Rules 5, effective March 31, 2010, addressing the new statutory post-judgment relief mechanism for persons whose identities have been stolen and falsely used by another person in a criminal proceeding. *See* 15 M.R.S. §§ 2181-2184, enacted by P.L. 2009, ch. 287, § 1, effective September 12, 2009. *See also*, Advisory Note—March 2010 to M.R. Crim. P. Part XIII and Rules 105-109.

Finally, the amendment modifies subdivision (d) of Rule 1 to reduce unnecessary references to forms, deleting language added when forms ceased being published with the Maine Rules of Criminal Procedure more than a decade ago. *See* Me. Rptr., 746-754 A.2d CV and LXVII-LXVIII.

RULE 2. PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

II. PRELIMINARY PROCEEDINGS

RULE 3. THE COMPLAINT

(a) Nature and Contents. The complaint shall be a plain, concise, and definite written statement of the essential facts constituting the crime charged. The complaint is not required to negate any facts designated a "defense" or any exception, exclusion, or authorization set forth in the statute defining the crime. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the crime are unknown or that the defendant committed it by one or more specified means. The complaint shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law, the class of crime which the defendant is alleged therein to have violated and the municipality where the crime is alleged to have occurred. Error in the citation of a statute or its omission shall not be grounds for the dismissal of the complaint or for reversal of a conviction if the error or omission was not prejudicially misleading.

All charges against a defendant arising from the same incident or course of conduct should be alleged in one complaint, except that special circumstances may require the use of separate instruments. A complaint may include multiple counts charged against a defendant when authorized pursuant to Rule 8(a). Nothing in this rule shall prohibit the later commencement of additional charges arising from the original incident or course of conduct. The court may administratively consolidate such subsequent charges with the original complaint into a single case docket. Two or more defendants may not be charged in the same complaint.

If a prior conviction must be specially alleged pursuant to 17-A M.R.S. § 9-A(1) it may not be alleged in an ancillary complaint or separate count but instead must be part of the allegations constituting the principal crime. A prior

conviction allegation made in one count may be incorporated by reference in another count.

(b) How Made. The complaint shall be made upon oath before a Superior Court justice or a District Court judge or other officer empowered to issue warrants against persons charged with crimes against the state. If a charge is enhanced to a Class C crime or above because of prior convictions, the complaint shall allege the prior convictions to charge the enhanced crime.

"Oath" includes affirmations as provided by law.

(c) Surplusage. The court on motion of the defendant may strike surplusage from the complaint.

(d) Amendment of Complaint. The attorney for the state may amend a complaint as a matter of right at any time prior to completion of the defendant's initial appearance pursuant to Rule 5 or 5C of these rules.

The court may permit a complaint to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced.

Unless the statutory class for the principal crime would be elevated thereby, amendment of a complaint for purposes of 17-A M.R.S. § 9-A(1) may be made as of right by the attorney for the state at any time prior to the imposition of sentence on the principal crime.

(e) Arrest Tracking Number (ATN) and Charge Tracking Number (CTN). Unless the crime charged is an excepted crime under Rule 57, each count of the complaint should include the assigned Arrest Tracking Number and Charge Tracking Number.

(f) State Identification Number. If a State Identification Number has been assigned to a defendant by the State Bureau of Identification, and if that State Identification Number is known to the attorney for the state, the complaint shall contain that number.

Advisory Committee Note—1981

[M.R. Crim. P. 3.] The added provision is presently contained in the Criminal Code, 17-A M.R.S. § 5(2)(A). The Criminal Law Advisory Commission recommends that it be transferred to the Criminal Rules, for the reason that it is a rule of pleading that properly belongs with procedural rules rather than in the substantive criminal law.

Advisory Committee Note—1983

[M.R. Crim. P. 3.] The class of crime may depend upon whether or not the crime is a first offense. For example, a Class D or E theft may be enhanced to a Class C theft if the defendant has two prior theft convictions. 17-A M.R.S. § 362(3)(C). The amendment seeks to make clear that the complaint should charge the enhanced crime and that the District Court should hold only a bind-over hearing on the charge. There is no need for an ancillary complaint in the District Court since the District Court has no trial jurisdiction. *See* 15 M.R.S. § 757 (As amended by Laws, 1982, c. 679, § 1). If the District Court binds over the defendant, then the grand jury may indict for the Class D theft and also return an ancillary indictment charging the Class C crime of habitual theft, as was done in *State v. Sapiel*, 432 A.2d 1262 (Me. 1981).

Advisory Committee Note—1989

[M.R. Crim. P. 3.] Rule 3 combines provisions of both Rules 3, adopting the format of District Court Rule 3.

The definition of "oath" in subdivision (b) is derived from Rule 54(c).

District Court Rule 3(e) is deleted because the bill of particulars is treated in Rule 16(c)(2).

Advisory Committee Note—1990

[M.R. Crim. P. 3(b).] Rule 3 is amended to delete the requirement that probable cause be established at the time a complaint is issued when a defendant is not in custody or before the court. This requirement was imposed on the assumption that an arrest warrant would be necessary in any case where the defendant was not in custody or before the court. *See* M.R. Crim. P. 3, Reporter's Note. This assumption is not accurate in the District Court, as

summonses are regularly used in minor criminal cases. Rule 4 establishes the procedure for obtaining an arrest warrant and can be used when an arrest warrant is needed. Continuing the requirement of establishing probable cause in every case in which a complaint is issued would place a substantial administrative burden on the District Court.

Advisory Committee Note—1998

[M.R. Crim. P. 3(e).] This new subdivision incorporates the last sentence of now repealed Rule 5A, section b into Rule 3 dealing with the complaint. *See* Advisory Committee Note to M.R. Crim. P. 5.

Advisory Committee Notes—2000

[M.R. Crim. P. 3(a).] This amendment is in response to the recent repeal of 15 M.R.S. § 757 and the enactment of 17-A M.R.S. § 9-A in its stead. *See* P.L. 1999, ch. 196, *effective* September 18, 1999. New subsection 1 of section 9-A directs, in relevant part, that "[t]he Supreme Judicial Court shall provide by rule the manner of alleging the prior conviction in a charging instrument . . . ." Because the Maine Judicial Information System equates new criminal conduct with any new charging instrument or count thereof, the newly created subdivision prohibits the use of an ancillary charging instrument or count and requires instead that the allegation of a prior conviction be part of the allegations constituting the principal offense. For efficiency purposes the newly created subdivision also allows a prior conviction allegation accompanying a principal offense in one count to be incorporated by reference in another count.

[M.R. Crim. P. 3(d).] *See* Advisory Committee Note to M.R. Crim. P. 7(e); *See also* Advisory Committee Note to M.R. Crim. P. 3(a).

Advisory Committee Note—2003

[M.R. Crim. P. 3(a).] The amendment replaces the terms "felony" and "misdemeanor" in subdivision (a) with appropriate references to the Maine Criminal Code crime classification scheme and, by implication, the unclassed crime of murder.

[M.R. Crim. P. 3(e).] This amendment deletes subdivision (e). *See* Advisory Committee Note to M.R. Crim. P. 10.

[M.R. Crim. P. 3(f).] This amendment replaces the "incident number" as a unique identifier with the "Arrest Tracking Number" and the "Charge Tracking Number." The change reflects the policy for the use of unique identifiers, at the charge level, recently adopted by the Maine Criminal Justice Information Systems Policy Board (16 M.R.S. §§ 633-637 (Supp. 2003)). Both the "Arrest Tracking Number" and the "Charge Tracking Number" are defined in Rule 57. *See also* Advisory Committee Note to M.R. Crim. P. 57.

Advisory Committee Note – March 2005

[M.R. Crim. P. 3(a) and (b).] These amendments are part of a broader recommendation made by a team of trial court justices and judges and clerks of court to streamline the process for initiating a criminal case that involves murder or at least one Class A, Class B, or Class C crime, accompanied or unaccompanied by related Class D or Class E crimes. Formerly such a case was required to be commenced in the District Court and, unless waived or preempted, necessitated that a bind-over hearing be held pursuant to Rule 5A. The new process eliminates the need for a bind-over hearing by starting the case in the Superior Court rather than the District Court. In this regard, such a case will be commenced by filing a criminal complaint directly in the Superior Court, unless an indictment has already been returned or an information filed (except as to a murder charge). The new process, unlike that which it replaces, encourages combining charges of Class C or higher crimes with charges of Class D or Class E crimes in the same charging instrument when permitted by Rule 8(a). Finally, the new process expressly recognizes the authority of Superior Court justices to approve criminal complaints filed in the Superior Court. The District Court still remains the court for initiating a criminal case that involves only Class D or Class E crimes.

Advisory Committee Note – March 2005

[M.R. Crim. P. 3(d).] This amendment clarifies that a complaint may be amended by the state as a matter of right at any time prior to completion of a defendant's initial appearance in District Court or Superior Court.

Advisory Note – June 2006

M.R. Crim. P. 3(f) and (g). The amendment redesignates subdivision (f) and (g) to be (e) and (f) respectively. This redesignation was overlooked when former subdivision (e) was deleted, effective January 1, 2004. *See* Me. Rptr., 832-845 A.2d XXIV-XXV and XXXV.

RULE 4. ARREST WARRANT OR SUMMONS

(a) Definitions. For purposes of this rule the following definitions apply:

(1) "Clerk" means a clerk or deputy clerk of the District Court and a clerk or deputy clerk of the Superior Court.

(2) "Electronic Arrest Warrant" means an arrest warrant, including a bench warrant, issued pursuant to statute and this rule that exists in electronic form and is entered into, maintained, managed, enforced, executed or recalled under the statewide warrant management system pursuant to 15 M.R.S. § 653 and this rule.

(3) "Paper Arrest Warrant" means an arrest warrant issued pursuant to statute and this rule that exists in paper form rather than in electronic form because it is excluded from the statewide warrant management system pursuant to 15 M.R.S. § 652, or because it is not yet in electronic form due to it being issued by a justice of the peace, issued by any judicial officer outside of the business hours of the court, or due to the temporary unavailability of the statewide warrant management system or other exigent circumstance pursuant to 15 M.R.S. § 654(1).

(b) Grounds for Issuance of Arrest Warrant or Summons.

(1) *Indictment.* An indictment is grounds for issuance of an arrest warrant or summons for the defendant named in the indictment.

(2) *Probable Cause.* Probable cause to believe that a crime has been committed and that the defendant committed it is grounds for an arrest warrant or summons for the defendant. Probable cause shall appear from the information or complaint or from an affidavit or affidavits sworn to before a Superior Court justice, a District Court judge or other officer empowered to issue process against persons charged with crimes against the state and filed with the information or complaint.

(3) *Bench Warrant.* A bench warrant may issue for a failure to appear or for contempt or as provided by statute.

(c) Who May Issue Arrest Warrant or Summons.

(1) *Indictment.* A clerk shall issue an arrest warrant or summons for the defendant named in the indictment when so directed by the court or so requested by the attorney for the state.

(2) *Probable Cause.* A Superior Court Justice, a District Court Judge or, when duly authorized to do so, a justice of the peace or clerk may issue an arrest warrant or summons based on probable cause, as determined pursuant to subdivision (b)(2).

(3) *Bench Warrant.* A Justice or Judge may authorize the issuance of a bench warrant physically or electronically. A clerk shall authorize the issuance of a bench warrant physically or electronically when so directed by the court, except in cases of contempt.

(d) Content of Arrest Warrant or Summons.

(1) *Warrant.* The arrest warrant shall bear the caption of the court or division of the court from which it issues. It shall contain an electronic signature of the justice, judge, or clerk issuing the arrest warrant electronically, or contain a physical signature by a justice or judge or other person authorized to issue arrest warrants in the event the arrest warrant issued is a paper warrant. It shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The arrest warrant shall contain available information concerning the identity and location of the defendant, including, but not limited to, photographs of the defendant, the defendant's last known address identified by town, county and geographic codes, the defendant's date of birth and any distinguishing physical characteristics that will aid in the location of the defendant and the execution of the warrant. It shall describe the crime charged and indicate when applicable that it is a crime involving domestic violence. It shall command that the defendant be arrested and brought before the court. The amount of bail may be fixed by the court and physically or electronically endorsed on the warrant.

(2) *Summons.* The summons shall be in the same form as the arrest warrant except that it shall summon the defendant to appear before the court at a stated time and place.

(e) Management of Issued Electronic or Paper Arrest Warrant.

(1) *Electronic Arrest Warrant and Recall Order*. Electronic arrest warrants, and all orders recalling electronic arrest warrants, shall be entered into, stored, and retained in the Judicial Bench warrant docket management system as provided in 15 M.R.S. § 653(1). The warrant docket management system shall be the sole official record of electronic arrest warrants issued and recalled pursuant to this rule.

(2) *Mandatory Filing and Entering Electronically of the Original of Certain Paper Arrest Warrants.* Unless the paper arrest warrant has already been executed or recalled, the original of the following paper arrest warrants must be filed and entered electronically into the warrant document management system as follows:

(A) Any paper arrest warrant issued by a justice of the peace or issued by any judicial officer outside of the regular business hours of a court must be filed on the next regular business day and entered electronically by the court as soon as possible thereafter. The filing must be made with the court that would have jurisdiction and venue over a criminal action resulting from the warrant. The original of any paper arrest warrant filed with the court shall remain with the court.

(B) Any paper arrest warrant issued due to the temporary unavailability of the statewide warrant management system or other exigent circumstances must be filed on the next regular business day and entered electronically by the court as soon as possible thereafter. The filing must be made with the court that would have jurisdiction and venue over a criminal action resulting from the warrant. The original of any paper arrest warrant filed with the court shall remain with the court.

Once a paper arrest warrant described in paragraph (A) and (B) is entered electronically into the warrant document management system, the resulting electronic arrest warrant becomes the sole official arrest warrant.

(3) *Filing of Paper Arrest Warrants Excluded from the Electronic Warrant Docket Management System*. Any paper warrants specifically excluded from the electronic warrant docket management system pursuant to 15 M.R.S. § 652 shall continue to be filed as follows:

(A) The original shall be filed with the court that would have jurisdiction and venue over a criminal action resulting from the warrant; and

(B) An attested copy shall be filed with the arrest warrant repository or the

investigating agency, as provided by former 15 M.R.S. ch. 99 and the former standards issued pursuant to that chapter.

(f) Execution of Electronic or Paper Arrest Warrant or Service of Summons.

(1) *By Whom.* The electronic arrest warrant or paper arrest warrant shall be executed by any officer authorized by law. The summons may be served by any constable, police officer, sheriff, deputy sheriff, marine patrol officer of the Department of Marine Resources, warden of the Department of Inland Fisheries and Wildlife, or any person authorized to serve a summons in a civil action.

(2) *Territorial Limits.* The electronic arrest warrant or paper arrest warrant may be executed or the summons may be served at any place within the State of Maine.

(3) *Manner of Execution of Electronic or Paper Arrest Warrant.* The electronic arrest warrant or paper arrest warrant shall be executed by the arrest of the defendant. If execution is of an electronic arrest warrant, showing the warrant to the defendant is not possible. If execution is of a paper arrest warrant, the officer need not have the warrant in the officer's possession at the time of the arrest, but upon request the officer shall show the warrant to the defendant as soon as possible. If the officer is executing an electronic arrest warrant or if the officer does not have the paper arrest warrant in his or her possession at the time of the arrest, he or she shall then inform the defendant of the crime charged and of the fact that an arrest warrant has been issued. The officer executing the electronic arrest warrant or paper arrest warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a bail commissioner.

(4) *Service of Summons.* The clerk shall mail a summons to the defendant's last known address or shall deliver it to any officer authorized by law to execute or serve it or to the attorney for the state, unless the defendant is in custody or otherwise before the court. More than one summons may issue for a defendant. Personal service is effected by delivering a copy to the defendant personally or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. A summons to a corporation shall be served in the same manner as a summons to a corporation is served in a civil case.

(5) *Failure of Service or Failure to Appear in Response to Summons*. If a mailed summons is returned undelivered or if a defendant cannot be personally served or if a defendant fails to appear in response to a summons, the clerk shall request the court to authorize a bench warrant.

(g) Return of Electronic or Paper Arrest Warrant or Summons.

(1) *Warrant*. The officer executing an electronic arrest warrant shall make a return of the warrant as provided by 15 M.R.S. ch. 100 and the standards issued pursuant to that chapter. The officer executing a paper arrest warrant shall make a return of the warrant as provided by former 15 M.R.S. ch. 99 and the former standards issued pursuant to that chapter.

(2) *Summons.* On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the state made at any time while the charge is pending, a summons returned unserved or a duplicate thereof may be delivered by the clerk to any authorized person for service.

Advisory Committee Note – 1983

[M.R. Crim. P. 4(a).] The amendment explicitly validates the commendable practice in some district attorneys' offices of keeping centralized control of all outstanding warrants.

Advisory Committee Note – 1988

[M.R. Crim. P. 4(c)(1).] The amendment corrects erroneous references to two state Departments, wardens of which are, authorized to serve criminal summons.

Advisory Committee Note – 1990

[M.R. Crim. P. 4.] Rule 4 is rewritten to merge former Rule 4 with former Rule 9. As both former rules were concerned with the issuance, form, execution or service, and return of an arrest warrant or summons, the Advisory Committee was of the view that merging the two rules would remove unnecessary duplication from the rules. In addition, the section of the rule on return of process was amended to make clear that return of a warrant or summons must be made to the court and not to a particular District Court judge and that an unexecuted warrant or unserved

summons could be delivered by a court clerk to an authorized person for execution or service.

Advisory Committee Note – 1993

[M.R. Crim. P. 4(a)(4), (a)(5), (b)(1), (d).] Rule 4 is amended to conform to Chapter 402 of the Public Laws of 1992, which inserted a new chapter (Chapter 94) into Title 15.

Rule 4(a)(5) incorporates the statute's provisions for possession of the arrest warrant.

Rule 4(b) tracks the statute's provisions for the contents of the arrest warrant contained in 15 M.R S.A. § 605(4).

Rule 4(d) incorporates the statute's provisions for making a return on the warrant.

Advisory Committee Notes – 2001

[M.R. Crim. P. 4(a).] This amendment reorganizes the content of subdivision (a) by transferring the current substance of the first sentence of paragraph (3) into paragraphs (1) and (2) and transferring to subdivision (c) treatment both of the consequences of a defendant's failure to respond to a summons, currently found in the second sentence of paragraph (3), and delivery of a summons, currently found in paragraph (4). Further, current paragraph (5) of subdivision (a) is renumbered paragraph (3) since current paragraphs (3) and (4) are stricken. Still further, the citation form of a statutory reference in current paragraph (5) of subdivision (a) is changed. Finally, paragraph (1) of subdivision (a) is amended to conform it to the Rule 7(c) requirement that an indictment may charge only one defendant.

[M.R. Crim. P. 4(c)(4).] This amendment clarifies that a clerk may serve a summons by mail.

[M.R. Crim. P. 4(c)(5).] This amendment adds paragraph (5) to clarify that in response to nonappearance, or an undelivered mailed summons, or in the event a defendant cannot be personally served, the clerk must request the court to authorize a warrant.

[M.R. Crim. P. 4(d)(1).] This amendment changes the citation form of a statutory reference.

Advisory Committee Note – March 2005

[M.R. Crim. P. 4(a)(2).] The amendment adds "a Superior Court justice" to the list of those who are authorized to issue a warrant of arrest or summons of persons charged by way of information or complaint upon a finding of probable cause. Although a justice of the Superior Court has the power to issue processes in criminal cases by statute (15 M.R.S. § 702), because cases involving a Class C or above crime (accompanied or unaccompanied by related Class D or Class E crimes) will now be initiated in the Superior Court rather than the District Court, an express reference to "a Superior Court justice" becomes important. *See also* Advisory Committee Note to M.R. Crim. P. 3(a) and (b).

Advisory Note – June 2006

M.R. Crim. P. 4. The amendment does four things. First, the rule is reorganized to better track the sequence of the process. Subdivision (a) now addresses the grounds for issuance of a warrant or summons only. Who may issue the warrant or summons and possession of a warrant, both formerly found in subdivision (a), are transferred to new subdivisions (b) and (d) respectively. Current subdivisions (b), (c) and (d) are redesignated (c), (e) and (f) respectively. The provision on possession of the warrant is transferred from Rule 4(a)(3) to Rule 4(d) because possession occurs later in the process than the topics covered by subdivisions (a), (b) and (c). Subdivision (d) sensibly retains the present rule that the issuing court maintain possession of the original warrant. Second, subdivision (a), paragraph (3) adds to the rule grounds for issuance of a bench warrant – to wit: "A bench warrant may issue for a failure to appear or for contempt or as provided by statute." The reference to statutory authorization is intended to cover special circumstances, such as those currently found in 17-A M.R.S. §§ 1348-B(7) and 1349-D(4). Third, subdivision (b), paragraph (2) identifies those officers empowered to issue process for the arrest of persons charged with crimes. Fourth, subdivision (b) incorporates the warrant provisions of Administrative Order JB-05-17, *Issuance of Warrants*, effective August 1, 2005 and includes in the definition of "clerk", Superior Court clerks and deputy clerks. The 122nd Legislature recently enacted as emergency legislation 4 M.R.S. § 107-A allowing any clerk or deputy clerk of the Superior Court to issue process for the arrest of persons charged with crimes if authorized to do so by the Chief Justice of the Superior Court. *See* P.L. 2005, ch. 540, § 1 (effective April 5, 2006). District Court clerks and deputy clerks already have parallel legislative authority. 4 M.R.S. § 161.

Advisory Note – April 2012

The amendment modifies Rule 4 to accommodate the recent statutory creation of the electronic arrest warrant accompanied by an electronic arrest warrant repository system pursuant to 15 M.R.S. ch. 100, enacted by P.L. 2011, ch. 214, § 2, effective February 1, 2012. The act eliminates in large measure reliance upon paper arrest warrants and the paper arrest warrant repository system with the repeal of 15 M.R.S. ch. 99 by P.L. 2011, ch. 214 § 1. However, the act leaves in place the previously existing paper arrest warrant repositories to manage and enforce the limited number of paper warrants that will nonetheless continue to exist. *See* P.L. 2011, ch. 214, § 5. Although the actual application process, the grounds for issuance and who may issue an arrest warrant remains unchanged, Rule 4 is changed to address the content, management, execution and return of both electronic and paper arrest warrants.

The specific changes to Rule 4 are as follows:

First, because it is now necessary to provide an explanation as to the meaning of an "electronic arrest warrant" and identify those arrest warrants that will, at least initially, be issued in paper form rather than electronically, a new subdivision (a) has been added entitled "Definitions." In addition to the terms "electronic arrest warrant" and "paper arrest warrant," the preexisting definition of "clerk," formerly located in subdivision (b)(4), is relocated to new subdivision (a). The addition of the new subdivision (a) necessitates the redesignation of subdivisions (a) through (f) to be subdivisions (b) through (g), respectively.

Second, newly redesignated subdivision (d)(1) respecting the content of the arrest warrant now requires an electronic signature (10 M.R.S. § 9402(8)) in the case of an electronically issued warrant rather than a physical signature as in the case of a paper warrant. Further, notwithstanding which form is employed, the content of the arrest warrant must include, when applicable, an indication that the crime charged is a crime involving domestic violence as required by 15 M.R.S. § 654(3)(D). *See also* 15 M.R.S. § 1003(3-A).

Third, newly redesignated subdivision (e) now addresses the management of both electronic arrest warrants (paragraph (1)) and paper arrest warrants (paragraph (3)), once issued. Paragraph (2) of subsection (e) mandates that all paper arrest warrants issued by a justice of the peace, issued by any judicial officer outside of the business hours of the court, or issued during the temporary unavailability of the

statewide warrant management system or other exigent circumstances pursuant to 15 M.R. S. § 654 (1), be promptly filed and entered electronically when feasible unless already executed or recalled. Further, whether an arrest warrant is issued from the outset in electronic form (paragraph (1)) or converted from an initially issued paper form (paragraph (2)), the warrant docket management system is the sole official record of the electronic arrest warrant, its execution and return or recall.

Fourth, newly redesignated subsection (f) now addresses the execution of both electronic arrest warrants and paper arrest warrants. In paragraph (3) it makes clear that, unlike a paper warrant, it isn't possible to show an electronic warrant to the defendant. However, as in the case of an officer not having in his or her possession the paper arrest warrant at the time of arrest, the defendant must be informed of the crime charged and the fact that an arrest warrant has been issued.

Fifth, newly redesignated subsection (g)(1) now addresses the return of both electronic arrest warrants and paper arrest warrants. The return in electronic form is as provided by 15 M.R.S. ch. 100 and the standards issued pursuant to that chapter. The return in paper form is as formerly provided by 15 M.R.S. ch. 99 and the former standards issued pursuant to that chapter.

Sixth, distinct from the changes necessitated by the addition of electronic paper warrants addressed above, to enhance clarity the word "arrest" has been added preceding the word "warrant" in redesignated subdivisions (b) through (g) and the word "bench" has been added before the word "warrant" in redesignated subdivision (f)(5).

RULE 4A. PROBABLE CAUSE DETERMINATION UPON WARRANTLESS ARREST FOR ANY CRIME

(a) Timing: Required Findings. Except in a bona fide emergency or other extraordinary circumstance, when a defendant arrested without a warrant for any crime is not released from custody within 48 hours after arrest, including Saturdays, Sundays, and legal holidays, a Superior Court justice, District Court judge, or justice of the peace shall determine, within that time period, whether there is probable cause to believe that a crime has been committed and that the arrested defendant has committed it. If the evidence does not establish such probable cause, the Superior Court justice, District Court judge, or justice of the peace shall discharge the arrested defendant. If a probable cause determination has not taken place within 36 hours after the arrest, including Saturdays, Sundays, and

legal holidays, the custodian shall notify the attorney for the state of the upcoming deadline. For purposes of this Rule "custody" means incarceration. Rule 45(a) and (b) have no application to this subdivision.

(b) Evidence. In making this determination the Superior Court justice, District Court judge or justice of the peace shall consider:

(1) the sworn complaint;

(2) an affidavit or affidavits, if any, filed by the state;

(3) a sworn oral statement or statements, if any, made before the Superior Court justice, District Court judge, or justice of the peace which is reduced to writing or electronically recorded by equipment that is capable of providing a record adequate for purposes of review. A Superior Court justice, District Court judge, or justice of the peace may administer the oath and receive an oral statement by telephone.

(c) Record. A finding that probable cause does or does not exist shall be endorsed on the complaint or other appropriate document and filed together with the sworn complaint, affidavit(s) or other written or recorded record with the clerk of the court having jurisdiction of the crime for which the arrested defendant is charged.

Advisory Committee Note—1998

[M.R. Crim. P. 4A.] This rule is newly created to incorporate the provisions of former Rule 5(d). Separate reference to the probable cause determination under former Rule 5(d) is necessary because it oftentimes is not part of the Rule 5 initial appearance proceeding and because it eliminates confusing references to two different 48 hour deadlines in Rule 5, one exclusive of weekends and holidays and one inclusive of weekends and holidays. Finally, two modifications have been made to former 5(d) to better address *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). First, the rule expressly recognizes that postponement of a probable cause determination beyond 48 hours of arrest can be appropriate in a particular case in a bona fide emergency or other extraordinary circumstance. Second, the rule requires that if a determination of probable cause has not taken place within 36 hours, the custodian must notify the attorney for the State. Within the next 12-hour period, the attorney for the State can both assess the situation and provide proper guidance to the custodian.

Advisory Committee Note – March 2005

[M.R. Crim. P. 4A(a) and (b).] The amendments add "a Superior Court justice" to the list of those judicial officers responsible for conducting probable cause determinations to comply with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The addition is in recognition that cases involving a Class C or above crime (accompanied or unaccompanied by related Class D or Class E crimes) will now be initiated in the Superior Court rather than the District Court. *See also* Advisory Committee Note to M.R. Crim. P. 3(a) and (b).

Advisory Note – June 2006

M.R. Crim. P. 4A. The amendment does five things. First, it adds the words "for any crime" to the Rule heading and to the first sentence of subdivision (a) to make clear that the post-arrest probable cause determination required under *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) applies to a warrantless arrest for any crime, misdemeanor and felony alike. Second, it replaces the word "defendant" in subdivision (a) with the words "arrested person" to better identify the person's actual status. For the same purpose, the word "arrested" has been added in subdivision (c). Third, it makes clear that neither subdivision (a) nor subdivision (b) of Rule 45 have application to subdivision (a). Fourth, it redesignates paragraphs (i), (ii) and (iii) in subdivision (b) to be paragraphs (1), (2) and (3) respectively. The latter redesignations reflect the standard division designation for paragraphs found throughout the Maine Rules of Criminal Procedure. Fifth, it replaces the term "offense" with the term "crime" in subdivision (c). This reference was overlooked when a similar reference in subdivision (a) was replaced with "crime" effective January 1, 2004. *See* Me. Rptr., 832-845 A.2d XLIX, LII.

Advisory Note – July 2012

See Advisory Note – July 2012 to M.R. Crim. P. 5(b) and (c). See also Advisory Note – July 2012 to M.R. Crim. P. 5C(b) and (d).

RULE 5. INITIAL PROCEEDINGS FOR DEFENDANTS ARRESTED OR SUMMONSED FOR CLASS D OR FOR CLASS E CRIMES ONLY

(a) Initial Appearance Before the Court. A defendant arrested for a Class D or Class E crime (and not charged with related Class C or higher crimes), (i) under a warrant issued upon a complaint filed in the District Court or the Superior Court or (ii) without a warrant, who is not sooner released, shall be brought before a District Court judge or a Superior Court justice without unnecessary delay and in no event later than 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays. Such appearance may be by audiovisual device in the discretion of the court. If such appearance has not taken place within 36 hours after the arrest, the custodian shall notify the attorney for the state of the upcoming deadline. If such appearance has not taken place within 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays, the custodian shall release the defendant from custody or bring the defendant forthwith before the District Court or the Superior Court for such appearance.

(1) *Defendants Arrested Under a Warrant.* Defendants arrested for a Class D or Class E crime (and not charged with related Class C or higher crimes) under a warrant issued upon a complaint shall be taken before the court designated in the warrant or the nearest available court. If the arrest is made at a place 100 miles or more from the court designated in the warrant, the defendant arrested, if bail has not previously been set or denied by the court, shall be taken before the nearest available court or bail commissioner, who shall admit the defendant to bail for appearance before the court within which the complaint has been filed.

(2) *Defendants Arrested Without a Warrant.* Defendants arrested without a warrant for a Class D or Class E crime~~s~~ (and not charged with related Class C or higher crimes) shall be taken before the nearest available court. The complaint shall be filed with the court forthwith. A determination of probable cause shall be made in accordance with Rule 4A.

(b) Initial Statement of Rights by the Court. At the initial court appearance of a defendant under subdivision (a) of this rule or at the first court appearance of any other defendant charged with a Class D or Class E crime (and not charged with related Class C or higher crimes), the presiding judge or justice, in open court, shall, unless waived by the defendant's counsel, inform the defendant of:

(1) the substance of the charges against the defendant;

(2) the defendant's right to retain counsel, to request the assignment of counsel, and to be allowed a reasonable time and opportunity to consult counsel before entering a plea;

(3) the right to remain silent and that the defendant is not required to make a statement, and that any statement made by the defendant may be used against the defendant;

(4) the maximum possible sentence, and any applicable mandatory minimum sentence; and

(5) the defendant's right to trial by jury and, in courts not operating a unified criminal docket, of the necessity of a demand for jury trial in accordance with these rules.

The statement of rights required to be given by this rule shall be stated live to the defendant in open court by a judge or justice, or stated by a judge or justice in a video recording viewed by the defendant prior to his or her first appearance.

(c) Pleas at Initial Appearance. A defendant charged with a Class D or Class E crime (and not charged with related Class C or higher crimes) shall be called upon to plead after that defendant has been provided with the statement of rights required by subdivision (b), unless that defendant has requested a reasonable time and opportunity to consult with counsel.

If a defendant charged with a Class D or Class E crime who is not represented by a lawyer for the day or other counsel pleads "not guilty" or for whom a plea of "not guilty" is entered by the court, the judge or justice shall ensure that the defendant is aware of his or her right to trial by jury and, in courts not operating a unified criminal docket, of the necessity of a timely demand for a jury trial in accordance with these rules.

Before accepting a guilty or nolo contendere plea from a defendant charged with a Class D or Class E crime, the judge or justice shall comply with the requirements of Rule 11(g).

(d) Assignment of Counsel. When a defendant, who is charged with a Class D or Class E crime, is entitled to court assigned counsel, the court shall

assign counsel to represent the defendant not later than the time of the initial appearance, unless the defendant elects to proceed without counsel. Counsel may be assigned, or a lawyer for the day may be designated, for the limited purpose of representing the defendant at initial appearance or arraignment. The determination of indigency and the assignment and compensation of counsel shall be governed by the provisions of Rules 44, 44A, 44B, and 44C.

Advisory Committee Note—1974

[M.R. Crim. P. 5(c).] The amendment to this rule requires that preliminary examinations be electronically recorded in accordance with the provisions of District Court Criminal Rule 39A providing for electronic sound recording, which is effective simultaneously. See Advisory Committee's Note to that rule.

Advisory Committee Note—1980

[M.R. Crim. P. 5.] The purpose of the proposed amendment of Criminal Rule 5 is two-fold. First, the requirement that an arrested person be taken before a magistrate within the division of the arrest is eliminated, and a specific time limit is placed on the amount of delay permitted between the time of arrest and the time of the first court appearance before a magistrate. Second, an express requirement that a judicial determination of probable cause be made at a defendant's first appearance is included in the Rule.

Paragraph (a). The requirement that an arrested person be taken before a magistrate *within the division* of arrest is eliminated and a specific time limit is added.

Paragraph (b). Because of the 48-hour requirement in paragraph (a), there will be cases where an attested person is taken before a magistrate out of the division of arrest, and a formal complaint has not been filed by the time of the first appearance be fore the magistrate. The requirement that the magistrate inform a person of the complaint against him has been expanded to cover those cases where a complaint has not yet been filed.

Paragraph (c) is new. The purpose of this paragraph is to insure that counsel is assigned promptly. Because defendants may be appearing out of the division of arrest, this paragraph expressly authorizes the magistrate to appoint counsel for the limited purpose of representing the defendant at the first appearance or arraignment only.

Paragraph (d) is new. This paragraph is designed to satisfy the rationale of *Gerstein v. Pugh,* 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

Paragraph (e). The term "bind-over hearing" has been used to highlight the distinction between the "preliminary examination," for which "bind-over hearing" is a synonym, and the *Gerstein v. Pugh* hearing described in paragraph (d). While the latter may be had before a magistrate outside the division of arrest, the bind-over hearing generally should be scheduled in the division of the arrest, or, in the case of an arrest under a warrant, in the division commanded in the warrant.

Advisory Committee Note—1989

[M.R. Crim. P. 5.] The functions of a District Court judge at a defendant's initial appearance depend on whether the charge is within the trial jurisdiction of the District Court. Rule 5 provided for the initial appearance on a charge of a Class C or higher crime, while District Court Rule 5 provided for the initial appearance on a charge of a Class D or Class E crime. The merger preserves the distinction. New Rule 5 is derived from Rule 5, while new Rule 5A is derived from District Court Rule 5.

The last paragraph of Rule 5(e) is derived from the last paragraph of Rule 7(b). This transfer is appropriate because the time when the District Court judge should notify the bound-over defendant of the possibility of proceeding by information is at the bind-over hearing.

District Court Rule 5(b), dealing with arraignment, is transferred to the arraignment rule, Rule 10.

The rules use the term "District Court judge" instead of "Magistrate" for the sake of clarity; there is no Maine judicial officer called a "Magistrate."

Advisory Committee Note—1991

[M.R. Crim. P. 5(d).] The previous language of the second paragraph appeared to limit the flexibility of the judge in selecting the source or sources from which to derive the determination of probable cause. This was due to the fact that the subparagraphs were joined by the connective "or." The present language was adopted during the recent merger in order to increase the judge's

flexibility in selecting the source or sources, but it has not had the intended effect. The proposed language states what the judge shall *consider* in making the determination of probable cause but is deliberately silent as to what source or sources the judge may *select* to derive the determination of probable cause. The proposed language should promote the original intent of increasing judicial flexibility in selecting the source or sources. Thus, in an unusual case where the sworn complaint sets forth sufficient facts from which the judge may determine that probable cause exists, an additional source is unnecessary.

Advisory Committee Note—1992

[M.R. Crim. P. 5(d).] In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), the United States Supreme Court held that a probable cause determination generally must be made within 48 hours after a warrantless arrest and that, in computing the 48-hour period, weekends and holidays may not be excluded from the computation. Since the combined effect of present Rules 5(a) and (d) and Rules 5A(a) and (d) of the Maine Rules of Criminal Procedure is to permit just such an exclusion, Rules 5 and 5A should be amended to excise this unconstitutional exclusion. The proposed amendment requires that weekends and holidays be *included* in the computation of the 48-hour period. The practical effect of the amendment is that some probable cause determinations required by Rules 5 and 5A will need to be made on a Saturday, Sunday or holiday.

In order to accommodate this situation, three practical procedural steps are proposed: (1) reduce the number of cases in which a probable cause determination must be made to those in which a determination is constitutionally required; (2) enlarge the number of judicial officers who may decide the issue; and (3) adopt procedural mechanisms to ease travel requirements.

A determination is constitutionally required to be made only in cases of "detention following a warrantless arrest" *(Riverside,* 111 S. Ct. at 1665). Thus if a defendant is arrested pursuant to an arrest warrant or is released on bail within the 48-hour period, the federal constitution does not require that a probable cause determination be made. Subdivision (d) of Rules 5 and 5A presently requires a determination if an arrest warrant is issued by a clerk of court or if the defendant is released "under any condition of release except personal recognizance." The amendment deletes both requirements. The Committee believes that quality control of clerks' warrants is best undertaken through the supervisory authority of the Chief Judge of the District Court pursuant to 4 M.R.S. § 161. The Committee also

believes that the present broad definition of "custody" is unsuited to the new situation.

The amendment enlarges the number of judicial officers who may decide the issue by authorizing justices of the peace to take any action required by subdivision (d) of Rules 5 and 5A.

The amendment would ease travel requirements by authorizing the judicial officer to perform by telephone the administration of oaths and the receipt of oral statements.

Advisory Committee Note—1994

[M.R. Crim. P. 5(a).] The amendment, in conjunction with new Rule 5B, authorizes the Chief Justice of the Supreme Judicial Court to issue an administrative order approving the experimental use of audiovisual devices in specified district courts for a specified period of time under specified conditions in certain limited situations. These situations are: (1) The initial appearance of a defendant in custody pursuant to Rule 5 or 5A, including a bail hearing: (2) The arraignment of a defendant in custody charged with a Class D or E offense.

[M.R. Crim P. 5(b) and 5(e).] Pre-conviction bail procedure for a defendant is largely, although not entirely, dictated by the Maine Bail Code (15 M.R.S. ch. 105-A) rather than by rule. *See* M.R. Crim. P. 46(a). The amendment reflects this fact. Comparable amendments are made to Rules 5(e), 5A(b), and 42(b).

Advisory Committee Note—1998

[M.R. Crim. P. 5.] This amendment is intended to streamline and clarify Rule 5 by splitting off into separate new rules subdivisions (d) and (e), dealing with initial probable cause determinations for warrantless arrests and with bind-over hearings, respectively, which are not part of the Rule 5 initial appearance. This amendment is also intended to incorporate certain provisions of former Rule 5A, which has been repealed because it is largely duplicative of Rule 5. This amendment also eliminates the requirement that a person arrested on a warrant demand to be brought before the nearest available District Court judge or bail commissioner if the person has been arrested more than 100 miles from the place where the warrant issued. This amendment also clarifies that the person shall have a reasonable amount of time to consult with counsel before entering a plea. This amendment also requires District Court judges to inform a person charged with a

Class D or E crime of the maximum penalties and any applicable mandatory minimum penalties before calling on the person to plead. Finally, the rule provides that at the end of 36 hours if the initial appearance before a District Court judge has not as yet taken place, the custodian must notify the attorney for the State. Within the remaining period the attorney for the State can both assess the situation and provide proper guidance to the custodian.

Advisory Committee Notes—1999

[M.R. Crim. P. 5.] This amendment identifies the District Court to which a person arrested under a warrant is to be brought as that "designated in the warrant" rather than as "within the division within which the warrant was issued." The amendment is also intended to clarify that a District Court Judge or bail commissioner should not alter a preexisting order of a court setting or denying bail. Finally, the amendment further clarifies that a person charged with a Class D or E crime may not be called upon to plead if that person has requested a reasonable time and opportunity to consult with counsel.

Advisory Committee Notes—2000

[M.R. Crim. P. 5.] This amendment, in conjunction with new Rule 5C, clarifies that Rule 5 governs initial proceedings in the District Court upon the filing of a complaint or an information (with waiver of indictment) only. New Rule 5C governs initial proceedings in the Superior Court following the filing of an indictment or information (with waiver of indictment). Apart from a number of purely formalistic modifications, this amendment to Rule 5 makes three additional changes. First, in subdivision (a) the phrase "court holidays" has been added to serve, in addition to "Saturdays, Sundays and legal holidays," as an exception to the requirement that the person in custody must appear before the court within 48 hours following arrest. "Court holidays" would include those nonjudicial days, although not a weekend or legal holiday, in which the court is simply not available due to, for example, judicial conferences, employee vacations, sickness or inclement weather. Postponement for "court holidays" beyond 48 hours, unlike Rule 4A, does not implicate *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Second, in subdivision (a) the consequence of exceeding 48 hours - namely, release from custody (on bail) - is clarified to ensure that the custodian, if a court is immediately available, has the additional option of getting the person before the court for that person's initial appearance. Third, and finally, in paragraph (1) of subdivision (a) a person arrested under a warrant may now be

taken "to the nearest available District Court" as an alternative to the District Court "designated in the warrant."

Advisory Committee Notes—2001

[M.R. Crim. P. 5(c).] This amendment requires the court at the initial appearance to provide the notice that is required by 14 M.R.S. § 3141(2)—namely, that if the person is ". . . convicted of the criminal offense and if a fine is imposed by the court, immediate payment of the fine in full is required."

[M.R. Crim. P. 5(d).] *See* Advisory Committee Note to M.R. Crim. P. 5(c).

Advisory Committee Note – March 2005

[M.R. Crim. P. 5.] The amendment makes changes reflecting that although the District Court shall remain the court for initiating a criminal case that involves Class D or Class E crimes, the District Court no longer is the court for initiating a criminal case that involves murder or at least one Class A, Class B, or Class C crime, accompanied or unaccompanied by related Class D or Class E crimes. Under the new process, any case involving at least one felony must be commenced by filing a criminal complaint directly in the Superior Court rather than in the District Court as has been the case. *See also* Advisory Committee Note to M.R. Crim. P. 3(a) and (b).

Advisory Note—July 2010

The amendment modifies Rule 5, subdivisions (a) and (d). [Amendments to related Rules subdivisions are in development.] The present amendment to Rule 5 makes three principal changes.

First, it eliminates the unnecessary distinction between the Superior Court and the District Court by making the rule applicable to initial proceedings occurring in either trial court for persons arrested or summonsed for misdemeanor crimes. *See also* Advisory Note—July 2010 to M.R. Crim. P. 1.

Second, it eliminates a point of confusion by clarifying that Rule 5 addresses initial proceedings for persons arrested or summonsed for Class D or Class E crimes only and not charged with a related Class C or higher crime. If the person is also arrested or summonsed for a related Class C or higher crime, the initial proceedings are as specified in Rule 5C rather than Rule 5.

Third, the amendment substitutes "assigned counsel" for "court-appointed counsel" and adds references to Rule 44 and "a lawyer for the day" in subdivision (d). The substitution and added reference to Rule 44 are in response to the recent statutory enactment establishing the Maine Commission on Indigent Legal Services. *See* Advisory Note—July 2010 to M.R. Crim. P. 44. The added reference to "a lawyer for the day" is for the purpose of completeness. The determination of indigency and the assignment and compensation of counsel is governed by the provisions of Rules 44, 44A, 44B, and 44C.

Advisory Note—July 2012

The amendment modifies Rule 5(b) and (c) in the following respects.

First, the word "person," or a variant thereof, is replaced with the word "defendant," or its variant, throughout subdivision (b) because the latter term is overwhelmingly employed in the Maine Rules of Criminal Procedure when referencing an accused.

Second, the introductory language to subdivision (b) is restated using a simpler approach.

Third, the former option in subdivision (b), that a defendant may waive being informed by the court of the defendant's constitutional rights at the initial appearance, is deleted. Waiver of such rights may be exercised only by the defendant's counsel. A lawyer for the day, appointed for the limited purpose of representing the defendant at the initial appearance, may waive for the defendant a statement of rights otherwise required at that initial appearance if the lawyer affirmatively informs the court that the lawyer has specifically advised the defendant of the rights and that the defendant understood them. *State v. Galarneau,* 2011 ME 60, ¶¶ 8-10, 20 A.3d 99.

Fourth, formalistic changes are made to paragraph (2) of subdivision (b) to enhance clarity and readability.

Fifth, the phrase "right to remain silent" is added in paragraph (3) of subdivision (b).

Sixth, former subdivision (c) is merged with subdivision (b). The use of two subdivisions is unnecessary and creates potential confusion.

Seventh, the provision covering admitting a defendant to bail, formerly in paragraph (4) of subdivision (b), is deleted as unnecessary because the procedure for setting preconviction bail, including the directive for court action, is addressed by statute in the Maine Bail Code.

Eighth, the word "penalties" in paragraph (4) of subdivision (b) [formerly paragraph (1) of subdivision (c)] is replaced by the word "sentence" both to conform paragraph (4)'s terminology with that of Rule 11(c)(1), and to eliminate a confusing term that more commonly is used in the context of civil violations rather than crimes.

Ninth, the phrase "in courts not operating a unified criminal docket" is added to paragraph (5) of subdivision (b) [formerly paragraph (2) of subdivision (c)]. The defendant must be informed of the necessity of a demand for jury trial only in courts not operating a unified criminal docket. In unified criminal docket courts, a defendant charged with any crime has the opportunity for a jury trial, unless that right is waived.

Tenth, the reference to payment of fines in former paragraph (3) of subdivision (c) is not incorporated into subdivision (b) because the issue of payment of fines does not arise until after a plea, and then only if a fine is imposed.

Eleventh, the final unnumbered paragraph in former subdivision (c) is deleted since its substance is now addressed in new subdivision (c).

Twelfth, a new final paragraph is added to subdivision (b) recognizing current practice that allows the general statements of rights to be presented by video at a defendant's first appearance, while clarifying the requirement of an individualized colloquy before the acceptance of any pleas that will result in conviction. The individualized colloquy is not required when a defendant is represented by retained or appointed counsel or a lawyer for the day and the court is satisfied that the attorney advised the person of the rights.

Finally, the amendment adds a new subdivision (c) to Rule 5 that, along with the amendments to Rule 5(b), clarifies the practice for statements of rights and taking of pleas at first appearance on misdemeanor charges.

See also Advisory Note – July 2012 to M.R. Crim. P. 5C(b) and (d).

[Rule 5A was in effect until June 30, 2006. Effective July 1, 2006 this Rule was deleted.]

RULE 5A. BIND-OVER HEARING

[abrogated July 1, 2006]

Advisory Committee Note—1989

[M.R. Crim. P. 5A.] The functions of a District Court judge at a defendant's initial appearance depend on whether the charge is within the trial jurisdiction of the District Court. Rule 5 provided for the initial appearance on a charge of a Class C or higher crime, while District Court Rule 5 provided for the initial appearance on a charge of a Class D or Class E crime. The merger preserves the distinction. New Rule 5 is derived from Rule 5, while new Rule 5A is derived from District Court Rule 5.

The last paragraph of Rule 5(e) is derived from the last paragraph of Rule 7(b). This transfer is appropriate because the time when the District Court judge should notify the bound-over defendant of the possibility of proceeding by information is at the bind-over hearing.

District Court Rule 5(b), dealing with arraignment, is transferred to the arraignment rule, Rule 10.

The rules use the term "District Court judge" instead of "Magistrate" for the sake of clarity; there is no Maine judicial officer called a "Magistrate."

Advisory Committee Note—1991

[M.R. Crim. P. 5A(d).] See Advisory Committee Note to amendment to Rule 5.

Advisory Committee Note—1992

[M.R. Crim. P. 5A(d).] In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), the United States Supreme Court held that a probable cause determination generally must be made within 48 hours after a warrantless arrest

and that, in computing the 48-hour period, weekends and holidays may not be excluded from the computation. Since the combined effect of present Rules 5(a) and (d) and Rules 5A(a) and (d) of the Maine Rules of Criminal Procedure is to permit just such an exclusion, Rules 5 and 5A should be amended to excise this unconstitutional exclusion. The proposed amendment requires that weekends and holidays be *included* in the computation of the 48-hour period. The practical effect of the amendment is that some probable cause determinations required by Rules 5 and 5A will need to be made on a Saturday, Sunday or holiday.

In order to accommodate this situation, three practical procedural steps are proposed: (1) reduce the number of cases in which a probable cause determination must be made to those in which a determination is constitutionally required; (2) enlarge the number of judicial officers who may decide the issue; and (3) adopt procedural mechanisms to ease travel requirements.

A determination is constitutionally required to be made only in cases of "detention following a warrantless arrest" *(Riverside*, 111 S. Ct. at 1665). Thus if a defendant is arrested pursuant to an arrest warrant or is released on bail within the 48-hour period, the federal constitution does not require that a probable cause determination be made. Subdivision (d) of Rules 5 and 5A presently require a determination if an arrest warrant is issued by a clerk of court or if the defendant is released "under any condition of release except personal recognizance." The amendment deletes both requirements. The Committee believes that quality control of clerks' warrants is best undertaken through the supervisory authority of the Chief Judge of the District Court pursuant to 4 M.R.S. § 161. The Committee also believes that the present broad definition of "custody" is unsuited to the new situation.

The amendment enlarges the number of judicial officers who may decide the issue by authorizing justices of the peace to take any action required by subdivision (d) of Rules 5 and 5A.

The amendment would ease travel requirements by authorizing the judicial officer to perform by telephone the administration of oaths and the receipt of oral statements.

Advisory Committee Note—1994

[M.R. Crim. P. 5A.] See Advisory Committee Note to 1994 amendment to Rule 5.

Advisory Committee Note—1998

[M.R Crim. P. 5A.] This amendment repeals the former Rule 5A in its entirety, which has been incorporated into Rule 5. New Rule 5A incorporates and clarifies former Rule 5(e) dealing with bind-over hearings. The first two sentences of the first full paragraph and the entire second paragraph of former subdivision 5(e) have also been incorporated into new Rule 5(b)(2). New Rule 5A(a) clarifies that a bind-over hearing shall not be held if Superior Court proceedings have been initiated against the charged person. New Rule 5A(b) explicitly states what was implicit in former Rule 5(e), that the State has the burden of establishing probable cause, and may use reliable hearsay evidence to do it. New Rule 5A(c) clarifies that if the court finds that there is no probable cause, the complaint shall be dismissed without prejudice and the defendant shall be discharged. New Rule 5A(d) clarifies that the District Court judge shall only transmit the record of the bind-over hearing to the Superior Court if the defendant has been bound-over.

Advisory Committee Notes—2001

[M.R. Crim. P. 5A.] This amendment reconfigures the current rule in an effort to enhance clarity and readability. In addition, it now requires the District Court to transmit to the Superior Court the District Court's entire original file in the case, any bail that has been taken and a copy of all the docket entries, not only when the state satisfies its burden of proof at a bind-over hearing (see new subdivision (e), paragraph (1)), or when there is a waiver of a bind-over hearing (see new subdivision (b), but also when a bind-over hearing is preempted by the return of an indictment or the filing of an information in the Superior Court (see new subdivision (c)). This new transmittal requirement gives the Superior Court full access to the District Court docket sheets and documents, including any bail order. The bail order continues in effect until further order of the Superior Court. It additionally obviates the need for the attorney for the state to file a dismissal of the criminal complaint in District Court in the event an indictment or information is filed in Superior Court before a bind-over hearing is held.

Advisory Committee Note – March 2005

[M.R. Crim. P. 5A.] Current Rule 5A relating to bindover hearings is deleted because the need for a bindover hearing has been eliminated by the new process that starts criminal cases involving murder or at least one Class A, Class B, or Class C crime, accompanied or unaccompanied by related Class D or Class E

crimes, in the Superior Court rather than the District Court. *See also* Advisory Committee Note to M.R. Crim. P. 3(a) and (b). The change is effective March 31, 2006, to allow cases filed before January 1, 2006, to be processed according to present practice.

Advisory Committee Note - June 2005

[M.R. Crim. P. 5A.] This amendment changes the date for the deletion of the rule governing bind-over proceedings in District Court from March 31, 2006 to July 1, 2006. This amendment is necessary to allow proper processing of criminal prosecutions that may be initiated with the filing of a complaint prior to January 1, 2006. The processing of matters utilizing a District Court bind-over hearing, unless preempted or waived, should be completed by July 1, 2006.

RULE 5B. TRANSFER FROM DISTRICT COURT TO SUPERIOR COURT IF A CLASS C OR HIGHER CRIME IS ADDED BY ATTORNEY FOR THE STATE

In any proceeding initiated in the District Court pursuant to Rule 5, the accused shall appear before the District Court as directed. In the event that the attorney for the state elects to charge by amendment of the original complaint pursuant to Rule 8(a), or by filing a new complaint, a related charge of murder or a related charge involving at least one Class A, Class B or Class C crime, the District Court, upon appearance of the accused, shall make a determination of probable cause if required by Rule 4A, advise the accused of the original and the added charges, assure that the accused, or counsel, has a copy of the added charges and provide the same initial statement and further statement required of the court pursuant to Rule 5C(b) and (c). Following the appearance, unless a plea of guilty is contemplated pursuant to Rule 11(f) and 17-A M.R.S. § 9(3), the District Court shall promptly transmit to the appropriate Superior Court the District Court's entire original file in the case, any bail that has been taken and a copy of all the docket entries. Bail shall continue until further order of the Superior Court. Pretrial motions will be heard and decided in Superior Court.

Advisory Committee Note—1994

[M.R. Crim. P. 5B.] See Advisory Committee Note to 1994 amendment to Rule 5.

Advisory Committee Note—1998

[M.R. Crim. P. 5B(1).] This amendment is necessitated by the changes being made to current Rules 5 and 5A. *See* Advisory Committee Notes to M.R. Crim. P. 4A, 5 and 5A.

Advisory Committee Note—2004

[M.R. Crim. P. 5B.] Rule 5B authorizing experimental use of audiovisual devices for arraignments was adopted to govern a specific project that has not been operational for some time. Appearance by audiovisual device at first appearances in District Court is now separately authorized in Rule 5(a). Thus, Rule 5B is no longer necessary.

Advisory Committee Note –March 2005

[M.R. Crim. P. 5B.] This amendment replaces a Rule abrogated August 1, 2004. It addresses the circumstance in which a criminal proceeding is initiated in District Court because the charges initially are Class D or Class E crimes, but the attorney for the state determines that a Class C or higher related crime should also be initiated. In that event, this new Rule allows for the complaint to be amended to include the felony. Upon appearance by the accused, the District Court, as presently occurs with felony charges, would advise the accused of his or her rights and the substance of the original and added charges, provide a copy of the pending charges to the accused, and address any bail issues. The accused would not be called upon to plead unless the accused elected to plead guilty pursuant to Rule 11(f). Following the appearance by the accused, the matter would be transferred to the appropriate Superior Court for all further proceedings. The transfer should occur promptly after the initial appearance.

Advisory Committee Note – June 2005

[M.R. Crim. P. 5B.] This amendment clarifies that if a Class C or higher crime is added by the attorney for the state in District Court, the proceeding to be conducted by the judge prior to transfer to the Superior Court may necessitate a Rule 4A determination of probable cause and, in addition to the current requirements specified in the Rule, must include both an initial statement and a further statement mirroring that provided to an accused by a Superior Court justice pursuant to Rule 5C(b) and (c).

Advisory Note—July 2010

The amendment to M.R. Crim. P. 5B eliminates the reference to any specific court in the second sentence, as the appearance and statements addressed in Rule 5C(b) and (c) may be before either a District Court judge or a Superior Court justice.

RULE 5C. INITIAL PROCEEDINGS FOR DEFENDANTS ARRESTED OR SUMMONSED FOR A CLASS C OR HIGHER CRIME

(a) Initial Appearance Before the Court. A defendant arrested for at least one Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes) (i) under a warrant issued upon an indictment or upon an information or complaint filed in the District Court or the Superior Court or (ii) without a warrant, who is not sooner released, shall be brought before a District Court judge or a Superior Court justice without unnecessary delay and in no event later than 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays. Such appearance may be by audiovisual device in the discretion of the court. If such appearance has not taken place within 36 hours after the arrest, the custodian shall notify the attorney for the state of the upcoming deadline. If such appearance has not taken place within 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays, the custodian shall release the defendant from custody or bring the defendant forthwith before the District Court or the Superior Court for such appearance.

(1) *Defendants Arrested Under a Warrant.* Defendants arrested for a Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes) under a warrant issued upon an indictment, an information, or a complaint shall be taken before the court designated in the warrant or the nearest available court. If the arrest is made at a place 100 miles or more from the court designated in the warrant, the defendant arrested, if bail has not previously been set or denied by the court, shall be taken before the nearest available court or bail commissioner, who shall admit the defendant to bail for appearance before the court within which the indictment, information, or complaint has been filed. A determination of probable cause pursuant to Rule 4A shall not be made.

(2) *Defendants Arrested Without a Warrant.* Defendants arrested without a warrant for a Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes) shall be taken before the nearest available court. The complaint or information shall be filed with the court forthwith. A determination

of probable cause shall be made in accordance with Rule 4A unless an indictment has been returned.

(b) Initial Statement by the Court. At the initial appearance of a defendant under subdivision (a) of this rule or at the first court appearance of any other defendant charged with at least one Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes), the presiding judge or justice, in open court, shall, unless waived by the defendant's counsel, inform the defendant of:

(1) the substance of the charges against the defendant;

(2) the defendant's right to retain counsel, to request the assignment of counsel, and to be allowed a reasonable time and opportunity to consult counsel before entering a plea; and

(3) the right to remain silent and that the defendant is not required to make a statement, and that any statement made by the defendant may be used against the defendant.

(c) Further Statement by the Court With Respect to Class C or Higher Crimes in the Absence of an Indictment or Information. A defendant charged by complaint with any Class C or higher crime shall not be called upon to plead to that Class C or higher crime, and the defendant shall be advised of the right to apply for a waiver of indictment and to enter any plea upon a complaint or an information after a waiver is accepted. No defendant charged with murder shall be allowed to plead guilty or nolo contendere prior to indictment.

(d) Further Statement and Arraignment by the Court with Respect to Class D or E Crimes. In addition to the statements in subsection (b) of this rule, when a defendant is charged with a Class D or Class E crime and no related Class C or higher crime, before calling upon a defendant to plead, the court shall provide to the defendant the statement of rights required by Rule 5(b), paragraphs 4 and 5 and comply with the other requirements of Rule 5(c).

(e) Assignment of Counsel. When a defendant is entitled to assigned counsel, the court shall assign counsel to represent the defendant for initial appearance, unless the defendant elects to proceed without counsel. Counsel may be assigned, or an attorney for the day may be designated, for the limited purpose of representing the defendant at initial appearance or arraignment. The

determination of indigency and the assignment and compensation of counsel shall be governed by the provisions of Rules 44, 44A, 44B, and 44C.

Subject to the limitation in subsection (c) of this Rule, a defendant who has been allowed a reasonable time and opportunity to consult with counsel shall be called upon to plead.

(f) Jurisdiction. When a defendant is arrested or summonsed for a Class C or higher crime and a first appearance occurs in any court, the Superior Court or a court with a unified criminal docket shall have jurisdiction over the Class C or higher charge and all related Class D and Class E charges even if the attorney for the state, at any time, elects to amend or dismiss the Class C or higher charge so that no Class C or higher charge remains pending.

Advisory Committee Notes—2000

[M.R. Crim. P. 5C.] New Rule 5C governs initial proceedings in the Superior Court following the filing of an indictment or information (with waiver of indictment). It is substantively similar to Rule 5, as newly amended, except in three particulars. First, in recognition of the significant logistical burden created by this new rule on the parties, courts and sheriffs, including the need on occasion to physically take the defendant to a different county in order to meet the rule deadline, the time period is set at 72 hours rather than 48. Setting the time period at 72 hours rather than 48, unlike Rule 4A, does not implicate *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Second, in view of the 72 hour period, notice by the custodian to the attorney for the state if appearance has not taken place is set at 48 hours rather than 36. Third, the new rule makes clear that a probable cause determination under Rule 4A is inapplicable. *See also* Advisory Committee Note to M.R. Crim. P. 5.

Advisory Committee Notes—2001

[M.R. Crim. P. 5C(c).] *See* Advisory Committee Note to M.R. Crim. P. 5(c).

[M.R. Crim. P. 5C(d).] This amendment redesignates current paragraph 5C(c) to be paragraph 5C(d). *See* Advisory Note to M.R. Crim. P. 5C(c).

Advisory Committee Note – March 2005

[M.R. Crim. P. 5C.] The amendment makes changes reflecting that the Superior Court is now the court for initiating a criminal case that involves murder or at least one Class A, Class B, or Class C crime, accompanied or unaccompanied by related Class D or Class E crimes. *See also* Advisory Committee Note to M.R. Crim. P. 3(a) and (b). The change also adopts a 48-hour requirement, similar to Rule 5 for first appearances for persons in custody.

In subsection (c) the amendment includes a new process to contemplate waiver of indictment and entry of any plea upon a first appearance. Any of the four alternative pleas, not guilty, guilty, nolo contendere, or not criminally responsible by reason of insanity, could be entered in this process. However, a negotiated acceptance of a plea of not criminally responsible by reason of insanity may not occur without an evidentiary hearing. *See* M.R. Crim. P. 11A(h).

Subsection (d) is similar to M.R. Crim. P. 5(d) for the District Court. It authorizes the Superior Court to conduct an arraignment and call upon a defendant to plead in cases where the case may have been initiated by filing a felony charge in the Superior Court, but at the first appearance, only misdemeanor charges and no related felony charges remain for prosecution. In such cases, consistent with Rule 5(d) and 22(a), a defendant must file a demand for a jury trial within 21 days of arraignment or be deemed to have waived the right to trial by a jury. The rule does not include a provision similar to Rule 5(d)(3) as the fine payment requirement would have been separately stated pursuant to Rule 5(b)(5).

Subsection (d) regarding arraignment of counsel and plea is redesignated subsection (e).

Subsection (f) is added to clarify that once a Superior Court proceeding is initiated after a person is arrested or summonsed for a felony charge, the Superior Court retains jurisdiction of all related misdemeanor charges, even if the felony charge is later dismissed or amended so that no felony charge remains pending.

Advisory Note—July 2010

The amendment modifies Rule 5C in six respects.

First, it eliminates the unnecessary distinction between the Superior Court and the District Court by making the rule applicable to initial proceedings occurring in either trial court for persons arrested or summonsed for at least one

Class C or higher crime, accompanied or unaccompanied by related Class D or Class E crimes. *See also* Advisory Note—July 2010 to M.R. Crim. P. 1.

Second, it adds clarity to subdivision (a), paragraphs (1) and (2) and subdivision (b) by adding in the first sentence of each "for a Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes)."

Third, the reference in subdivision (b) to the required immediate payment of any fine is eliminated, as the statute requiring that statement at initial appearance has been repealed.

Fourth, the substance of Rule 5, subdivision (c) currently repeated in subdivision 5C(d) is deleted in favor of simply directing that the court "provide to the person the further statement required by Rule 5(c)."

Fifth, the direction to admit the person to bail is moved from the list of rights the person is to be informed about to the end of subdivision (b) as a direction for action the court is to take in the proceeding.

Sixth, the same changes are made to subdivision (e) that are made to Rule 5, subdivision (d). *See* Advisory Note—July 2010 to M.R. Crim. P. 5.

Seventh, in subdivision (f) a reference is added to "a court with a unified criminal docket."

Advisory Note—July 2012

The amendment to subdivision (b) conforms the introductory language of subdivision (b) to that in Rule 5(b) and, as in Rule 5(b), the option that the charged defendant may waive being informed by the court of the constitutional rights listed therein is eliminated. Waiver of such rights may be exercised only by the defendant's counsel. See also Advisory Note – July 2012 to M.R. Crim. P. 5(b) and (c).

The amendment also replaces the word "person," or a variant thereof, with the word "defendant," or its variant, throughout subdivision (b). See also Advisory Note – July 2012 to M.R. Crim. P. 5(b) and (c).

Finally, the provision covering admitting a defendant to bail is deleted as unnecessary because the procedure for setting preconviction bail, including the directive for court action, is addressed by statute in the Maine Bail Code.

The amendment modifies subdivision (d) in three respects.

First, it changes the current reference to "Rule 5(c)" to read "Rule 5(b), paragraphs (4) and (5)" both because the rights addressed in subdivision (b) and (c) of Rule 5 have now been collapsed into a single subdivision (b) [see Advisory Note – July 2012 to M.R. Crim. P. 5(b) and (c)] and because the initial statement by the court in Rule 5C(b) already provides for the first three rights contained in Rule 5(b).

Second, it adds a directive that the court also comply with requirements of new subdivision (c) of Rule 5.

Third, it replaces the word "person," or a variant thereof, with the word "defendant," or its variant, throughout subdivision (d). See also Advisory Note – July 2012 to M.R. Crim. P. 5(b) and (c).

See also Advisory Note – July 2012 to M.R. Crim. P. 5(b) and (c).

III. INDICTMENT AND INFORMATION

RULE 6. THE GRAND JURY

(a) Number of Grand Jurors. The grand jury shall consist of not less than 13 nor more than 23 jurors and a sufficient number of legally qualified persons shall be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) *Challenges.* Either the attorney for the state or a defendant who has been held to answer may challenge an individual grand juror on the ground that the juror is not legally qualified or that a state of mind exists on the juror's part which may prevent the juror from acting impartially. All challenges must be in writing and allege the ground upon which the challenge is made, and such challenges must be made prior to the time the grand jurors commence receiving evidence at each session of the grand jury. If a challenge to an individual grand juror is sustained,

the juror shall be discharged and the court may replace the juror from persons drawn or selected for grand jury service.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or, if not previously determined upon challenge, on the lack of legal qualifications of an individual juror or on the ground that a state of mind existed on the juror's part which prevented the juror from acting impartially, but an indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record shall not be public except on order of the court. During the absence of the foreperson the deputy foreperson shall act as foreperson.

(d) Presence During Proceedings. While the grand jury is taking evidence, only the attorneys for the state, the witness under examination, and, when ordered by the court, a security officer, an interpreter, translator, court reporter, or operator of electronic recording equipment may be present. While the grand jury is deliberating or voting, only the jurors may be present.

(e) General Rule of Secrecy. A juror, attorney, security officer, interpreter, translator, court reporter, operator of electronic recording equipment, or any person to whom disclosure is made under this rule may not disclose matters occurring before the grand jury, except as otherwise provided in these rules or when so directed by the court. No obligation of secrecy may be imposed upon any person except in accordance with this rule. In the event an indictment is not returned, any stenographic notes and electronic backup, if any, of an official court reporter or tape or digital record of an electronic sound recording and any written record of information necessary for an accurate transcription prepared by the operator and any transcripts of such notes, tape or digital record shall be impounded by the court. The court may direct that an indictment be kept secret until the defendant is in custody or has given bail, and in that event the court shall seal the indictment and no person may disclose the finding of the indictment except

when necessary for the issuance or execution of a warrant or summons. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and any vote of any juror, may be made to:

(1) an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws;

(2) such staff members of an attorney for the state as are assigned to the attorney for the state and are reasonably necessary to assist an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws; and

(3) another state grand jury by an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws.

Any person to whom matters are disclosed under paragraphs (1) or (2) of subdivision (e) of this rule may not utilize that grand jury material for any purpose other than assisting the attorney for the state in the performance of such attorney's duty to enforce the state's criminal laws.

(f) Recording of Proceedings. Upon motion of the defendant or the attorney for the state, the court, in its discretion for good cause shown, may order that a court reporter or operator of electronic recording equipment be present for the purpose of taking evidence. No person other than a court reporter or operator of electronic recording equipment shall be permitted to record any portion of the proceeding.

(g) Procedure for Preparation and Disclosure of Transcript. No transcript may be prepared of the record of the evidence presented to the grand jury without an order of the court. Upon motion of the defendant or the attorney for the state and upon a showing of particularized need, the court may order a transcript of the record of the evidence to be furnished to the defendant or the attorney for the state upon such terms and conditions as are just.

(1) Transcripts of the record of the evidence may also be furnished upon such terms and conditions as are just:

(A) when ordered by the court preliminarily to or in connection with a judicial proceeding and upon a showing of particularized need; or

(B) when ordered by the court at the request of an attorney for the state to an appropriate official of another jurisdiction for the purpose of enforcing the criminal laws of another jurisdiction upon a showing that such disclosure may constitute evidence of a violation of the criminal laws of that other jurisdiction.

(2) A petition for disclosure pursuant to paragraph (1) of subdivision (g) shall be filed in the Superior Court where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the state, the petitioner shall serve written notice of the petition upon:

(A) the attorneys for the state who were present before the grand jury, or their designee;

(B) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding; and

(C) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard prior to disclosure of the transcript of the record of the evidence. The court shall order such a hearing to be closed to the extent necessary to prevent disclosure of matters occurring before the grand jury.

(3) If the judicial proceeding giving rise to the petition is before a court of another county, the Superior Court which convened the grand jury may transfer the disclosure hearing to the Superior Court of the county of the petitioning court, unless the court convening the grand jury may reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The Superior Court convening the grand jury may order transmitted to the Superior Court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy.

(h) Disclosure for Certain Law Enforcement Purposes. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and any vote of any grand juror, may be made to such law enforcement personnel (including personnel of the United States, another state or territory or subdivision of such) as are deemed necessary by an attorney for the state to assist in the performance of the duty of an attorney for the state to enforce the state's criminal laws. Any person to whom matters are disclosed under this subdivision may not utilize that grand jury material for any purpose other than assisting an attorney for the state in the performance of such attorney's duty to

enforce the state's criminal laws. An attorney for the state shall promptly provide the Superior Court, which convened the grand jury whose material has been disclosed under this subdivision, with the names of the persons and agencies to whom such disclosure has been made, and shall certify that the attorney for the state has advised such persons of their obligation of secrecy under this rule.

(i) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned to the court by the grand jury or its foreperson or its deputy foreperson in open court. If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment, the foreperson shall so report to the court in writing forthwith.

(j) Excuse. At any time for cause shown, the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused. No juror may participate in voting with respect to an indictment unless the juror shall have been in attendance at the presentation of all the evidence produced in favor of and adverse to the return of the indictment.

Advisory Committee Note—1971

[M.R. Crim. P. 6(b)(1) and (2).] The amendments to Rule 6(b) are necessitated by the enactment of Maine Laws, 1971, c.391 which adopts a comprehensive scheme for challenges to the array of grand jurors and traverse jurors. While the new statute authorizes the court to adopt rules "not inconsistent" with its provisions, it also provides that: "The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the State or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the provisions of this chapter."

The new statute contains no method whereby a challenge to the array of grand jurors may be made before the grand jury is sworn; to this extent, it is inconsistent with the prior provisions of Rule 6(b)(1). The amendment to 6(b)(1) eliminates all reference to challenges to the array of grand jurors prior to the swearing of the grand jury, but retains the provisions for challenge to an individual grand juror prior to swearing of the grand jury.

The procedure for motion to dismiss an indictment if the grand jury was not properly selected is retained in Rule 6(b)(2). The limiting language of Rule

6(b)(2), "if not previously determined upon challenge," is moved to make it applicable only to challenges to individual grand jurors.

There is one inconsistency between the new statute and Rule 6(b)(2), the statute denominates the procedural device for attacking the indictment as a motion to quash, whereas the Rule refers to a motion to dismiss. The Committee recommends retention of the motion to dismiss because Rule l2(a) has abolished motions to quash and it seems unwise to reintroduce this procedural device into the criminal procedure of the State of Maine. The inconsistency can be cured in the omnibus bill at the next meeting of the Legislature.

Advisory Committee Note—1978

1. Maine Rule of Criminal Procedure 6(d):

Rule 6(d) is amended for purposes of clarity; no substantive change is intended.

2. Maine Rule of Criminal Procedure 6(e):

Rule 6(e) is amended to effect a transfer of the provision for discovery of grand jury transcripts from former Rule 16(a) to Rule 6(e). The transfer is appropriate because discovery of grand jury transcripts, unlike other Rule 16 discovery, is not something which is discovered from the State, but is something which is made available to counsel for the parties by court order.

It further provides that no transcript of the record of the evidence presented to the grand jury shall be prepared without a court order.

Advisory Committee Note—1979

[M.R. Crim. P. 6(d).] Because an *official* court reporter may not be available on those occasions when the court orders that grand jury evidence be taken down, Rule 6(d) is amended to provide that, though unofficial, a qualified court reporter will suffice.

Advisory Committee Note—1985

[M.R. Crim. P. 6(h).] Proposed section (h) provides for limited disclosure of information or exhibits for certain law enforcement purposes. This section

does not supersede the requirement of Rule 6(e.) for disclosure of a grand jury transcript.

This section is not intended to derogate from the tight of the defendant to request discovery pursuant to Rule 16(b) of whatever reports or statements are made by the person to whom disclosure is made. To implement this right a contemporaneous amendment is made to Rule 16(a) to require the attorney for the state to notify the defendant of the contents of the disclosure order.

Advisory Committee Note—1986

[M.R. Crim. P. 6(d).] The provision for a motion for recording grand jury proceedings is presently buried in Rule 6(d), which governs *presence* during proceedings. Given the importance of the motion for recording, provision for the motion should be made more accessible in the rules. This has been done by giving the motion its own subdivision as new Rule 6(f).

The amendment also corrects any misimpression that might exist that an interpreter can be present without a court order.

[M.R. Crim. P. 6(e).] The provisions for preparation and disclosure of a grand jury transcript are presently buried in Rule 6(e)'s restrictions on disclosure of proceedings. Given their importance, they should be made more accessible in the rules. This has been done by giving the provisions their own subdivision in new Rule 6(g).

The word "official" is deleted in the first sentence of the first paragraph for consistency with the April 16, 1979 amendment to Rule 6(d).

[M.R. Crim. P. 6(i) and (j).] Present Rules 6(f) and (g) are relocated to accommodate new Rules 6(f) and (g).

[M.R. Crim. P. 6(f).] The first sentence is brought forward from Rule 6(d), for the reasons stated in the note to the amendment thereto.

The second sentence is added to make clear that no recording of grand jury proceedings is permitted except pursuant to the first sentence.

Examples of good cause for recording include the likely fabrication of testimony, the likely need to refresh a witness's memory and the need to deter or

punish contempt. Although the final decision as to whether the evidence proffered by the movant constitutes good cause must be within the discretion of the court, the Committee believes that a little elaboration may be helpful.

A. *Likely Fabrication of Testimony*

A motion to record the grand jury testimony of a witness for the purpose of impeachment must be supported by evidence showing a likelihood that the witness will fabricate testimony. Thus showing may include a witness's prior inconsistent statements or his strong motive to proffer untruthful testimony before the grand jury or traverse jury.

B. *Likely Need to Refresh a Witness's Memory*

A motion to record grand jury testimony of a witness for the purpose of refreshing that witness' memory must be supported by evidence showing a likelihood of one or more of the following factors: (a) that an unusually long delay will exist between the witness's testimony before the grand and traverse juries, such as when the target of the grand jury is a fugitive or the crime is unsolved; (b) the witness is testifying to unusually complex facts; (c) the witness has a physical or mental ailment which affects recall; or (d) the witness's youth or advanced age affects recall.

In addition to the factors stated in these examples, the court may consider supplementary factors such as the seriousness of the offense, the significance of the witness's testimony to the case against the defendant, and the availability of court reporters and other logistical concerns.

[M.R. Crim. P. 6(g).] Rule 6(g) is brought forward from Rule 6(e), for the reasons stated in the note to the amendment to Rule 6(e).

Advisory Committee Note—1997

[M.R. Crim. P. 6(e).] The provisions of M.R. Crim. P. 6(e) are deleted and replaced with a revision of the text of Fed. R. Crim. P. 6(e)(2). The new subdivision does not alter the longstanding principle of grand jury secrecy recognized by the Maine courts. *See State v. Levesque*, 281 A.2d 570, 573 (Me. 1971) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)); *see also* 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 6.6 at III-17 (1992).

"Matters occurring before the grand jury" include, but are not limited to, the identity of witnesses, witness testimony before the grand jury, exhibits produced before the grand jury or pursuant to grand jury subpoena, and any other materials or items which indicate the focus of the grand jury process. *See* Russell J. Davis, Annotation, *What are "Matters Occurring Before the Grand Jury" within Prohibition of Rule 6(e) of the Federal Rules of Criminal Procedure*, 50 ALR Fed. 675 (1979 & Supp. 1995). Neither the prior subdivision, nor its replacement apply to material obtained or created independently of the grand jury as long as the disclosure of such material does not reveal what transpired before the grand jury. The grand jury secrecy rules also continue not to apply to information which has become a matter of public record, such as introduction of evidence at trial. Likewise, a witness before the grand jury may not be placed under any obligation of secrecy. *See also Butterworth v. Smith*, 494 U.S. 624 (1990) (Florida statute prohibiting grand jury witnesses from disclosing their own testimony violates the First Amendment.)

[M.R. Crim. P. 6(e)(1).] New paragraph (1) of subdivision (e) provides that the disclosure of matters occurring before the grand jury to attorneys for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws is not prohibited by the general rule of grand jury secrecy pursuant to this subdivision. However, the attorneys for the state are subject to the secrecy provision of M.R. Crim. P. 6(e) with respect to additional disclosures of grand jury matters. The amendment is consistent with corresponding federal and state rules.

Under the existing provisions of M.R. Crim. P. 6(h)(1), an attorney for the state, present for witness examination before a grand jury, may not disclose matters to the elected district attorney or to the attorney general, to other supervising lawyers or to colleagues without the prior approval of the court. *See* 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 6.8 at III-24 (1992) ("Rule 6(h) makes clear that the attorney for the state who attends a grand jury proceeding must obtain a court order before disclosing information received during that proceeding to colleagues, assistants, and law enforcement officers for their use in assisting in enforcing the laws of Maine."). The requirement of obtaining a court order prior to the disclosure of matters occurring before the grand jury to other attorneys for the state hampers consistent grand jury assistance by the attorneys for the state, serves as an obstacle to the effective and proper operation of the grand jury and has proven so burdensome that the requirement is too often ignored by the prosecuting office and in turn not enforced by the court. The corresponding federal rule provides for disclosure among attorneys for the state, and the amended subdivision

adopts, with minor revision, the language of the federal rule. *See* Fed. R. Crim. P. 6(e)(3)(A)(i).

New paragraph (1) of subdivision (e) is in accord with the holding of the United States Supreme Court in *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983) by confining disclosure of matters occurring before the grand jury to "attorneys for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws." *Cf. United States v. John Doe, Inc*., I, 481 U.S. 102 (1987) (Fed. R. Crim. P. 6 does not require Government attorney involved in grand jury investigation of criminal matter to obtain court order before making continued use of grand jury materials in civil proceeding). In *Sells Eng'g*, the Court held that attorneys for the government assigned to civil matters may not have full access to grand jury material for use in civil actions. The Court found that such disclosure under Fed. R. Crim. P. 6(e)(3)(C)(i) and demonstrates particularized need for the materials. 463 U.S. at 420. See hereinafter comment respecting M.R. Crim. P. 6(g)(1)(A). The Court further noted that:

> We do not mean to suggest that [Fed. R. Crim. P. 6(e)(3)(A)(i)] access to grand jury materials is limited to those prosecutors who actually *did* appear before the grand jury. If that were so, the Government would be arbitrarily foreclosed from increasing or changing the staffing of a given criminal case after indictment, or even from replacing an attorney who leaves Government service. Moreover, there would be little point to such an interpretation since anyone working on a given prosecution would clearly be eligible under Rule 6(d) to enter the grand jury room, even if particular individuals did not have occasion to do so. . . . [T]he intention of the Rule is that every attorney (including a supervisor) who is working on a prosecution may have access to grand jury materials, at least while he is conducting criminal matters.

Id. at 429, n.11.

The amendment is also in accord with the statutes and rules of neighboring jurisdictions in the Northeast. *See* Mass. R. Crim. P. 5(d) ("A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of his official duties or when specifically directed to do so by the court"); R.I. Super. Ct. R. Crim. P. 6(e) ("Disclosure of matters occurring before the grand jury, other than its deliberations or the vote of any juror where an indictment has not been returned, may be made to

attorneys for the State for use in the performance of their duties"); Vt. R. Crim. P. 6(f) ("Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the prosecuting attorneys for use in the performance of their duties"); N.Y. Crim. Proc. Law Art. 190.25(4)(a) ("For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order").

[M.R. Crim. P. 6(e)(2).] New paragraph (2) of subdivision (e) provides that the disclosure of matters occurring before the grand jury to the staff of an attorney for the state as is reasonably necessary to assist an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws is not prohibited by the general rule of grand jury secrecy pursuant to this subdivision. Under the existing provisions of M.R. Crim. P. 6(h)(2), secretarial and administrative assistance with any materials relating to the grand jury may not be proper absent prior court order upon a separate motion in each grand jury matter. This requirement has proven so burdensome that in practice court approval is not now commonly sought by an attorney for the state nor is this requirement commonly enforced by the court. The new paragraph recognizes that attorneys for the state rely upon their staff for administrative and clerical assistance with respect to matters occurring before the grand jury including, but not limited to, the preparation of case files, the organization of grand jury exhibits, and assistance with grand jury witnesses.

The term "staff members" includes those persons who have an employment relationship with, or are assigned as staff to an attorney for the state. Persons employed by the counties or federal government to work in the offices of the various district attorneys are included in this definition. The term "staff members" also includes independent contractors or expert witnesses employed by an attorney for the state to assist an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws. *See United States v. Lartey*, 716 F.2d 955, 963-64 (2d Cir. 1983) (temporary government personnel and independent contractors employed by a government agency are "government personnel" within the meaning of Fed. R. Crim. P. 6(e)(3)(A)(ii)); *United States v. Anderson*, 778 F.2d 602, 605-06 (10th Cir. 1985) (disclosure of materials to expert witness employed by the government was permissible).

The new paragraph is similar to Fed. R. Crim. P. 6(e)(3)(A)(ii) which provides that matters occurring before the grand jury may be disclosed without court order to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Under Fed. R. Crim. P. 6(e)(3)(A)(ii), "government personnel" means members of the prosecution support staff, law enforcement personnel, and personnel of any federal agency which is assisting the government attorney. *See* Richard Neumeg, Annotation, *Who are "Government Personnel" within meaning of Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure to whom matters occurring before the grand jury may be disclosed*, 54 ALR Fed. 805 (1981 & Supp. 1995). Unlike the federal rule, however, sworn law enforcement officers merely assisting in a specific investigation do not constitute "staff" within the meaning of this subdivision.

In addition to the requirement that the person be a member of the "staff" of an attorney for the state, any disclosure of matters occurring before the grand jury must be "reasonably necessary" to assist the attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws. The language "reasonably necessary" is taken from M.R. Evid. 502(a)(4) and M.R. Evid. 502(a)(5) which provides for the confidentiality of client communications make to a "lawyer" and "representatives of the lawyer." Similar to the extension of the Lawyer-Client Privilege under M.R. Evid. 502, the amendment permits the disclosure of matters occurring before the grand jury to staff members of an attorney for the state as are reasonably necessary to assist an attorney for the state. *See* M.R. Evid. 502(a)(5) ("A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of legal services to the client *or those reasonably necessary for the transmission of the communication*.") (emphasis added). The staff of an attorney for the state to whom matters occurring before the grand jury are disclosed is subject to the grand jury secrecy requirements pursuant to this subdivision.

[M.R. Crim. P. 6(e)(3).] New paragraph (3) of subdivision (e) provides that the disclosure of matters occurring before the grand jury by an attorney for the state to another grand jury is not prohibited by the general rule of grand jury secrecy pursuant to this subdivision. The language of the new paragraph is taken from Fed. R. Crim. P. 6(e)(3)(C)(iii), adopted in 1983 to codify the existing case law which permitted, in some circumstances, the disclosure of grand jury material from one grand jury to another. *See United States v. Content*, 735 F.2d 628, 630 (1st Cir. 1984); *United States v. Penrod*, 609 F.2d 1092, 1095-97 (4th Cir.) cert.

denied, 446 U.S. 917 (1979); *United States v. Garcia*, 420 F.2d 309, 311 (2d Cir. 1970). "In this kind of situation, '[s]ecrecy of grand jury materials should be protected almost as well by the safeguards at the second grand jury proceeding, including the oath of the jurors, as by judicial supervision of the disclosure of such materials.'" Fed. R. Crim. P. 6(e)(3)(C) Advisory Committee Notes, 97 F.R.D. 245, 269 (1983), *quoting United States v. Malatesta*, 583 F.2d 748 (5th Cir. 1978). The rule applies to disclosure between the regular sitting and the special sitting of grand juries. *See* 15 M.R.S. § 1256 (1980).

[M.R. Crim. P. 6(g).] The provisions of M.R. Crim. P. 6(g) are deleted and replaced. Its new substance conforms with the prior subdivision (g). Pursuant to the prior subdivision and its replacement no transcript of witness testimony or evidence presented to the grand jury may be prepared without court order. Furthermore, under both, there is no provision for recording the attorney for the state's advice or comments to the grand jury. *See State v. Haberski*, 449 A.2d 373, 378 (Me. 1982), *cert. denied*, 495 U.S. 1174 (1983). The new subdivision and prior Rule 6(g) both require that a transcript may not be furnished until the movant has established "particularized need" for access to the transcript. The new subdivision is not intended to alter whatsoever the "particularized need" standard as previously addressed by the Law Court. *See State v. Philbrick*, 551 A.2d 847, 851 (Me. 1988) (inconsistencies between grand jury testimony and trial testimony "were not so glaring that without more showing, release of the grand jury transcript was compelled"); *State v. Mahaney*, 437 A.2d 613, 619-20 (Me. 1981) (mere allegation that there may be changes between witness' grand jury testimony and trial testimony does not constitute particularized need for access to grand jury transcripts); *State v. Doody*, 432 A.2d 399, 400-402 (Me. 1981) (allegation of possible inconsistencies does not constitute particularized need for access to grand jury transcripts); *State v. Rich*, 395 A.2d 1123, 1127 (Me. 1978), *cert. denied*, 444 U.S. 854 (1978) (proper denial of motion for court reporter where defendant merely argued that transcripts would be valuable for impeachment purposes); *State v. Cugliata*, 372 A.2d 1019, 1022-25 (Me. 1977) (defendant failed to demonstrate particularized need for access to grand jury transcripts); *see also* 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 6.8 at III-22 (1992) ("The Law Court has interpreted the particularized need requirement strictly and has regularly upheld the Superior Court in denying or stringently limited access to grand jury testimony under Rule 6") (footnote omitted). The new subdivision merely codifies existing case law and provides more specific grounds under which matters before the grand jury may be disclosed.

[M.R. Crim. P. 6(g)(1)(A).] New subparagraph (A) of paragraph (1) of subdivision (g) provides for the disclosure of transcripts of evidence presented to the grand jury preliminarily to or in conjunction with a judicial proceeding upon order of a justice of the Superior Court. The new subparagraph adopts the two-pronged definition of "preliminarily to" articulated by the United States Supreme Court in *United States v. Baggot*, 463 U.S. 476 (1983). With respect to the first prong, the Court held that Fed. R. Crim. P. 6(e)(3)(C)(i) "contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. . . . If the primary purpose of disclosure is not to assist in the preparation or conduct of a judicial proceeding, disclosure . . . is not permitted." *Id*. at 480. With respect to the second prong, the *Baggot* Court held that the litigation must be more than a remote contingency before disclosure can be characterized as preliminary to a judicial proceeding. *Id*. at 482, n.6.

The new subparagraph adopts the common law definition of judicial proceeding. "[T]he term 'judicial proceeding' includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime." *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958) (Hand, J.); *see* Black's Law Dictionary 849 (6th ed. 1990). Under this subdivision, the following may qualify as judicial proceedings: attorney and judicial disciplinary hearings, law enforcement officer disciplinary hearings, impeachments hearings, grand jury proceedings of the federal government or any other state, and trials of the federal government or any other state. In addition to the requirement that disclosure must be preliminarily to or in connection with a judicial proceeding, the movant must establish particularized need for access to the grand jury transcripts. The language of the subparagraph is adopted from Fed. R. Crim. P. 6(e)(3)(C)(i).

[M.R. Crim. P. 6(g)(1)(B).] New subparagraph (B) of paragraph (1) of subdivision (g) permits disclosure of transcripts of evidence presented to the grand jury to other jurisdictions upon a motion of the attorney for the state. The subparagraph is substantially similar to the corresponding federal rule, but uses the broader term "jurisdiction" in order to authorize disclosure to foreign countries. *Compare* Fed. R. Crim. P. 6(e)(3)(C)(iv).

[M.R. Crim. P. 6(g)(2).] New paragraph (2) of subdivision (g) also identifies the necessary parties that must be served notice when a petition for disclosure is filed under this subdivision. The purpose of the subdivision is to

provide a hearing, prior to disclosure of grand jury materials, to all persons who might suffer substantial injury. Where the party seeking disclosure is not the attorney for the state, this subdivision also requires that party to notify the attorneys for the state who were present during the matter before the grand jury or their designee, the parties to the proceedings, and such other parties as the court may direct. If the party seeking disclosure is the attorney for the state, the proceedings may be ex parte. Attorneys for the state should ordinarily file disclosure motions ex parte whenever a public filing would result in a breach of grand jury secrecy. The term "parties to the judicial proceeding" refers to the named parties in the judicial proceeding for which disclosure is sought.

[M.R. Crim. P. 6(g)(3).] New paragraph (3) of subdivision (g) adopts the language and procedure of Fed. R. Crim. P. 6(e)(3)(F) which authorizes a court to transfer a disclosure hearing to the court conducting the judicial proceeding which has given rise to a petition for disclosure. The amendment and the corresponding federal rule adopt the procedure suggested by the United States Supreme Court in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), for resolving venue issues with respect to grand jury disclosure proceedings. Both the amendment and the corresponding federal rule recognize that the court conducting the judicial proceeding is usually in the best position to weigh the impact and the need of the material sought and to determine whether it is appropriate to disclose the grand jury material. Nothing in this section should be construed to extend jurisdiction over grand jury matters or grand jury disclosure hearings to the District Courts.

[M.R. Crim. P. 6(h).] The provisions of M.R. Crim. P. 6(h) are deleted and replaced. The new subdivision allows the limited disclosure of matters occurring before the grand jury to law enforcement personnel who are assisting the attorney for the state with the enforcement of state criminal laws. The term "law enforcement personnel" includes sworn law enforcement officers within the meaning of 17-A M.R.S. § 2(17) (Supp. 1995), law enforcement personnel of any state, and federal law enforcement personnel.

Disclosure to law enforcement personnel is permitted only when necessary to assist in enforcing state criminal laws. The amendment does not permit disclosure for civil law enforcement purposes under this subdivision. In contrast to the holdings of the federal courts in *Unites States v. Hogan*, 489 F. Supp. 1035, 1039 (W.D. Wash. 1980) (probation officers are not government personnel within the meaning of Fed. R. Crim. P. 6(e)(3)(A)(ii), therefore inclusion of grand jury material in presentence report was improper), and *Bradley v. Fairfax*, 634 F.2d

1126, 1129 (8th Cir. 1980) (disclosure not appropriate for use in parole revocation hearings), the subdivision includes probation revocation investigations and presentence investigations as matters which constitute enforcement of state criminal laws within the meaning of this subdivision.

Under this subdivision, unlike that which it replaces, there is no requirement of court authorization to disclose matters occurring before the grand jury to law enforcement personnel. The attorney for the state, however, has an affirmative duty to provide promptly a written notice to the Superior Court listing the names and agencies of all persons to whom disclosure has been made under this subdivision. The written notice shall also include written certification that the attorney for the state has advised such persons of their obligation of secrecy under this rule. The written notice and certification must be filed with the Superior Court in which the grand jury is sitting, and may be filed before or following such disclosure.

Advisory Committee Note—2003

[M.R. Crim. P. 6(c) and (i).] The amendment replaces the word "foreman" with the word "foreperson" in order to make the subdivisions gender neutral.

Advisory Note – June 2006

M.R. Crim. P. 6(a) and (b)(2). The amendment replaces in the text spelled-out numbers with their figure counterparts. Referring in the text of a rule to numbers using figures rather than spelling the numbers out is the modern practice respecting the Maine Rules of Criminal Procedure because it enhances clarity and readability. The number "one" is an exception and is generally spelled out.

M.R. Crim. P. 6(e)(2) and (3). The amendment adds at the end of paragraph 2 immediately following the semicolon the word "and" and at the end of paragraph 3 replaces the semicolon with a period.

M.R. Crim. P. 6(i). The amendment modifies the current requirement that a grand jury appear as a body in open court at the time it returns its indictments by allowing this duty to be performed as well by the jury's foreperson or deputy foreperson. This change is for the purposes of sound judicial administration. The amendment additionally replaces the word "judge" with the word "court". This change achieves consistency of terminology throughout the rule. Finally, the

amendment replaces in the text spelled-out number "twelve" with its figure counterpart. *See* Advisory Note to M.R. Crim. P. 6(a) and (b)(2).

Advisory Note - 2008

M.R.Crim.P. 6(d) and (e). The amendment adds the term "translator". *See* Advisory Note to M.R.Crim.P. 28.

Advisory Note – 2009

M.R.Crim.P. 6(d). The amendment adds "operator of electronic recording equipment" to accommodate the recording of grand jury proceedings by way of an electronic sound recording. Prior to this amendment, Rule 6 contemplated that only official court reporters would be used for taking evidence in grand jury proceedings. However, with the recent substantial reduction in the number of official court reporters, their availability for purposes of taking evidence in grand jury proceedings has been correspondingly reduced, necessitating the recognition in Rule 6 of an electronic sound recording option.

M.R.Crim.P. 6(e). The amendment expands the rule of secrecy to include an "operator of electronic recording equipment." *See also* Advisory Note – 2009 to M.R.Crim.P. 6(d). Further, in the event of a no bill by a grand jury the items subject to a court order of impoundment is expanded by the amendment to include the "electronic backup" currently used by many official court reporters in addition to their stenographic notes and the "tape or digital record of an electronic sound recording as well as any written record of information necessary for an accurate transcription prepared by the operator." *See generally*, M.R.Civ.P. 76H and M.R.Crim.P. 27(c). An "electronic backup" or "digital record" may include, in addition to a tape, preservation of a record on a CD, DVD, Flash Drive or other device capable of storing electronic or digital files for later recall.

M.R.Crim.P. 6(f). The amendment adds "operator of electronic recording equipment" to provide for an electronic sound recording option in addition to using a court reporter to take evidence in grand jury proceedings. *See also* Advisory Note – 2009 to M.R.Crim.P. 6(d).

Advisory Note—July 2010

The amendment to M.R. Crim. P. 6(d) and (e) adds "security officer" to subdivision (d) to allow the court to order that a security officer be physically

present while the grand jury is taking evidence when the court is satisfied that this action is appropriate to help ensure the safety of the grand jurors and the attorneys for the state. Additionally, the amendment expands the rule of secrecy in subdivision (e) to include a "security officer."

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment, Information or Complaint. All proceedings in which the crime charged is murder shall be prosecuted by indictment. All proceedings in which the crime charged is a Class A, Class B, or Class C crime shall be prosecuted by indictment, unless indictment is waived, in which case prosecution may be by information or complaint in accordance with this Rule.

In the event that a Class D or Class E charge may be joined with a related charge of murder or a related charge involving at least one Class A, Class B, or Class C crime under Rule 8(a), that Class D or Class E charge should be prosecuted in the same indictment charging murder or the same indictment, information or complaint charging the Class A, Class B, or Class C crime.

Any indictment, information or complaint so filed, if the indictment, information or complaint supplements or replaces another charging instrument, must indicate the docket number previously assigned to the earlier charging instrument.

(b) Waiver of Indictment. Any crime except murder may be prosecuted by information or complaint upon request of the defendant, if the defendant, after being advised by the court of the nature of the charge and of the defendant's rights, shall in writing signed by the defendant waive prosecution by indictment; such waiver with the approval of the court endorsed thereon shall be annexed to the information or complaint.

(c) Nature and Contents. An indictment shall be signed by the foreperson of the grand jury, and an information shall be signed by the attorney for the state and certified on information and belief. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the crime charged. The indictment or information is not required to negate any facts designed a "defense" or any exception, exclusion, or authorization set forth in the statute defining the crime. It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in

another count. It may be alleged in a single count that the means by which the defendant committed the crime are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law, and the class of crime which the defendant is alleged therein to have violated. Error in the citation of a statute or its omission shall not be grounds for the dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

All charges against a defendant arising from the same incident or course of conduct should be alleged in one indictment or information. An indictment or information may include multiple counts charged against a defendant when authorized pursuant to Rule 8(a). Nothing in this rule shall prohibit the later commencement of additional charges arising from the original incident or course of conduct. The court may administratively consolidate such subsequent charges with the original indictment or information into a single case docket. Two or more defendants may not be charged in the same indictment or information.

If a prior conviction must be specially alleged pursuant to 17-A M.R.S. § 9-A(1) it may not be alleged in an ancillary indictment, information or separate count thereof but instead must be part of the allegations constituting the principal crime. A prior conviction allegation made in one count may be incorporated by reference in another count.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Indictment or Information. The court may permit the amendment of an indictment charging a crime other than a Class D or Class E crime at any time before verdict or finding if the amendment does not change the substance of the crime.

The court may permit the amendment of an indictment charging a Class D or Class E crime, or an information at any time before verdict or finding if no additional or different crime is charged and if no substantial right of the defendant is prejudiced.

Unless the statutory class for the principal crime would be elevated thereby, amendment of an indictment or information for purposes of 17-A M.R.S. § 9-A(1) may be made as of right by the attorney for the state at any time prior to the

imposition of sentence on the principal crime and sentencing shall be continued until the attorney for the state has been afforded the opportunity to obtain an amended indictment if the allegation must be made by the grand jury.

(f) Arrest Tracking Number (ATN) and Charge Tracking Number (CTN). Unless the crime charged is an excepted crime under Rule 57, each count of the indictment or information should include the assigned Arrest Tracking Number and Charge Tracking Number.

(g) State Identification Number. If a State Identification Number has been assigned to a defendant by the State Bureau of Identification, and if that State Identification Number is known to the attorney for the state, the indictment or information shall contain the State Identification Number.

Advisory Committee Note—1976

Advisory Committee Notes to Rule 7(a) of the Maine Rules of Criminal Procedure:

This amendment is consistent with 17-A M.R.S. § 9(1) and (2). It implements Art. 1, Sec. 7 of the Maine Constitution which requires that all infamous crimes be prosecuted by indictment. The constitutionality of 17-A M.R.S. § 9 was recognized in *Opinion of the Justices*, Me., 338 A.2d 802 (1975).

Advisory Committee Notes to Rule 7(b) of the Maine Rules of Criminal Procedure:

This amendment is consistent with 17-A M.R.S. § 9 which allows waiver of indictment except for 1st and 2nd degree criminal homicide.

Advisory Committee Note—1977

Rule 7(a) of the Maine Rules of Criminal Procedure:

This amendment conforms the Rule to the re-introduction in the Criminal Code of the crime of murder, 17-A M.R.S. § 201, in lieu of the crimes of homicide in the first and second degree. P.L. 1977, c. 510, § 38, effective October 24, 1977.

Rule 7(b) of the Maine Rules of Criminal Procedure:

See Note 1.

Advisory Committee Note—1978

[M.R. Crim. P. 7(f).] Rule 7(f)'s provisions governing a bill of particulars are transferred to the new discovery rule in order to emphasize the bill's discovery function. See Note to Rule 16.

Advisory Committee Note—1980

The amendment to the first paragraph makes clearer that indictment cannot be waived in a murder prosecution.

The amendment to the second paragraph is intended to save paperwork and court time in dealing with plea agreements which provide for charging the defendant with a different Class D or Class E crime than that charged in the District Court.

Advisory Committee Note—1981

[M.R. Crim. P. 7(c).] The added provision is presently contained in the Criminal Code, 17-A M.R.S. § 5(2)(A). The Criminal Law Advisory Commission recommends that it be transferred to the Criminal Rules, for the reason that it is a rule of pleading that properly belongs with procedural rules rather than in the substantive criminal law.

Advisory Committee Note—1985

[M.R. Crim. P. 7(e).] The amendment is designed to codify the case law on the permissibility of amending an indictment. The absence of such a provision in Rule 7 has tended to cause confusion.

The leading statement of the rule is found in *State v. Larrabee,* 377 A.2d 463, 465 (Me. 1977):

> It is beyond peradventure that the State can amend an indictment as to form but would have to resubmit the indictment to the grand jury if it desired a substantive change . . .

> A substantive amendment is one that changes the nature or grade of the offense charged . . .
> If, however, the change in an indictment does not alter any fact which must be proved to make the act charged a crime, the amendment is formal . . .

See also *State v. Hathorne*, 387 A.2d 9, 12 (Me. 1978).

Advisory Committee Note—1989

[M.R. Crim. P. 7(b) and (e).] The last paragraph of Rule 7(b) is transferred to Rule 5(e) because the timing of the notification is at the bind-over hearing.

The references in Rule 7(e) to the amendment of a complaint have been deleted because Rule 3(d) provides for such amendment.

Advisory Committee Notes—2000

[M.R. Crim. P. 7(c).] *See* Advisory Committee Note to M.R. Crim. P. 3(a).

[M.R. Crim. P. 7(e).] Except where the sentencing class for the principal offense would be elevated thereby, this amendment provides that an attorney for the state retains the right at any time prior to sentence imposition on the principal offense to amend the indictment or information for purposes of alleging a prior conviction for sentence enhancement purposes, including, if need be, utilizing the grand jury. The exception avoids a constitutional problem presented, once jeopardy has attached, by a sentencing factor that must be pled and proved in the same manner as an element. *See Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 1224 n.6 (1999) (Under Due Process clause and jury guarantee of the Sixth Amendment, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged . . . [formerly], submitted to a jury, and proven beyond a reasonable doubt.") *See also* Advisory Committee Note to M.R. Crim. P. 3(d).

Advisory Committee Note—2003

[M.R. Crim. P. 7(b).] The amendment replaces the modifying phrase "not punishable by life imprisonment" with the phrase "other than murder," since with the enactment of the crime of aggravated attempted murder, in violation of 17-A M.R.S. § 152-A (Supp. 2003) [P.L. 2001, ch. 413, § 2], the crime of murder is no

longer the only crime punishable by life imprisonment, although murder remains the only crime for which waiver of indictment is precluded by statute. *See* 17-A M.R.S. § 9(2) (1983).

[M.R. Crim. P. 7(c).] *See* Advisory Committee Note to M.R. Crim. P. 6(c) and (i).

[M.R. Crim. P. 7(f).] *See* Advisory Committee Note to M.R. Crim. P. 3(f). *See also* Advisory Committee Note to M.R. Crim. P. 57.

Advisory Committee Note – March 2005

[M.R. Crim. P. 7(a) and (b).] The amendments remove the provisions that contemplate a case originating in the District Court that involves murder or a Class A, Class B, or Class C crime and the attendant bind-over proceeding. Further, the inclusion of Class D or Class E crimes in an indictment or information is made contingent upon the charging of a related Class C or higher crime in that same indictment or information. *See also* Advisory Committee Note to M.R. Crim. P. 3(a) and (b).

Advisory Note – June 2005

[M.R. Crim. P. 7.] Rule 7, as originally amended by the order of March 24, 2005, is further amended at several points to specify that actions taken based on an information may also be taken based on a complaint, subject to compliance with the same procedures necessary to initiate or continue prosecution of an action by an information.

Advisory Note – June 2006

M.R. Crim. P. 7(e). The amendment replaces the term "offense" in the third paragraph with the term "crime". This reference to "offense" was overlooked when all similar references throughout Rule 7, including subdivision (e), were replaced with "crime" effective January 1, 2004. *See* Me. Rptr., 832-845 A.2d XLIX, LIV-LV.

RULE 8. JOINDER OF CRIMES AND OF DEFENDANTS

(a) Joinder of Crimes. Two or more crimes should be charged in the same indictment, information or complaint in a separate count for each crime if the crimes charged, whether of the same class or different classes, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions which are connected or which constitute parts of a common scheme or plan.

(b) Joinder of Defendants. The attorney for the state who initiates a prosecution against two or more defendants may file a Notice of Joinder with respect to defendants who are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting a crime or crimes. A Notice of Joinder must be filed with each case to be joined. Upon the filing of such notices, the cases so designated in the notices are joined. The defense may move pursuant to paragraph (d) of this rule for relief from the Notice of Joinder. The Notice of Joinder should be filed at the same time as the charging instrument but in any event must be filed no later than 10 days after the charging instrument is filed.

(c) Trial Together of Indictments, Informations or Complaints. The court may order two or more indictments, informations, or complaints to be tried together against a single defendant if the crimes should have been joined under paragraph (a). The court may order two or more indictments, informations, or complaints to be tried together against two or more defendants if the defendants could have been joined under paragraph (b).

(d) Relief From Prejudicial Joinder. If it appears that a defendant or the state is prejudiced by a joinder of offenses against a single defendant or by the joinder of defendants, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires, including ordering multiple simultaneous trials.

Advisory Committee Note—1976

[M.R. Crim. P. 8(a).] This amendment is to accommodate the abolition of the felony-misdemeanor distinction in the new Criminal Code, Title 17-A of the Maine Revised Statutes.

Advisory Committee Note—1989

[M.R. Crim. P. 8.] Present Rule 8 provides for joinder of charges in a single pleading and Rule 13 provides for joinder of pleadings for trial, while Rule 14 provides for relief from either kind of joinder. Rule 8 combines these provisions into a single rule, new Rule 8.

Advisory Committee Note—1996

[M.R. Crim. P. 8(d).] The amendment to subdivision (d) is added so as to expressly authorize, as an exercise of court discretion, the employment of multiple simultaneous trials in situations where that procedure is both appropriate and consistent with sound judicial administration. Currently this procedure is impliedly authorized by M.R. Crim. P. 1(c) pursuant to case law. *State v. Bowman*, 588 A.2d 728, 732-734 (Me. 1991); *State v. Rolerson*, 593 A.2d 220, 221 (Me. 1991).

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION [DELETED]

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

RULE 10. ARRAIGNMENT

Unless otherwise provided by law, arraignment shall be conducted in open court and shall consist of reading the indictment, information or complaint to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The clerk shall cause a copy of the indictment or information to be furnished to the defendant or the defendant's counsel before the defendant is called upon to plead and notation thereof shall be made in the docket. The clerk shall cause a copy of the complaint, other than a uniform summons and complaint, to be furnished to the defendant or defendant's counsel before the defendant is called upon to plead, if requested by the defendant or the defendant's counsel. When the crime charged is a Class D or Class E crime, a represented defendant may enter a plea in writing without the necessity of an arraignment in open court unless the court requires the defendant to appear personally.

When the administration of justice would be served thereby, the court may order that an arraignment occur in a county other than the county in which the prosecution is pending.

Advisory Committee Note—1986

[M.R. Crim. P. 10.] The amendment is intended to make clear the Superior Court's authority to order arraignment outside the county in which the prosecution is pending. There may be circumstances where it is simpler and much less expensive to conduct the arraignment in another county. For example, indicted defendants held in the Maine State Prison will most efficiently be arraigned in Knox County. It is understood that arraignment in another county may in some cases require additional travel by defense counsel or the use of substitute counsel for arraignment only.

Advisory Committee Note—1989

[M.R. Crim. P. 10.] Rule 10 is amended to cover arraignment an a complaint, a subject now covered by District Court Rule 5(b).

Advisory Committee Note—1990

[M.R. Crim. P. 10.] Rule 10 is amended to make clear that when it is provided by statute that arraignment need not be in open court, the provisions of Rule 10 will not apply. For example, some minor violations of the fishing and hunting laws specifically allow a defendant to plead guilty by mail. It was not the intent in the merger of the District and Superior Court criminal rules to disturb this practice. This amendment to Rule 10 creates an exception to the requirement of Rule 43 that a defendant be present at arraignment.

Advisory Committee Note—1991

[M.R. Crim. P. 10.] When the offense charged is a Class D or Class E crime, it is common practice in some District Courts to enter pleas of not guilty without the necessity of an arraignment in open court when counsel has in writing indicated that the defendant has decided to enter this plea and provided the writing to the court in advance of the date set for arraignment. *See State v. Kovtuschenko*, 576 A.2d 206 (Me. 1990). Defense counsel should provide a copy of this writing to the attorney for the state. M.R. Crim. P. 49(a). This practice is efficient and the fact that the defendant is represented by counsel provides assurance that the defendant will appear at future court proceedings. In the unusual case where the court wishes to have the defendant appear in person for arraignment it may reject the entry of the plea by mail and require a personal appearance.

Advisory Committee Note—1994

[M.R. Crim. P. 10.] The amendment conforms the Rule to new Rule 5B.

Advisory Committee Note—2003

[M.R. Crim. P. 10.] This amendment transfers the substantive content of current Rule 3(e) into current Rule 10. Rule 3(e) was itself added in 1998 when former Rule 5A was deleted and replaced in its entirety, including the last sentence of section (b) that read: "The Clerk shall furnish to the defendant or the defendant's counsel, upon request, a copy of the complaint, other than a uniform traffic ticket and complaint, before the Defendant is called upon to plead." *See* M.R. Crim. P. 3(e) advisory committee note to 1998 amend. Me. Rptr., 699-709 A.2d CIII. Because the core concern addressed by both Rule 3(e) and its precursor rule is the availability to the defendant of a copy of the complaint before being called upon to plead, the content of Rule 3(e) more properly belongs in Rule 5 or Rule 10. *See* ME. CONST. art. 1, § 6. ("In all criminal prosecutions, the accused shall have a right . . . [t]o demand the nature and cause of the accusation, and have a copy thereof.") Between the two options Rule 10 has been chosen since it currently addresses this same core concern in the context of an indictment or information. Unlike the clerk's duties relative to furnishing an indictment or information, however, the amendment imposes no duty upon the clerk to either furnish a complaint in the absence of a request, or to note the furnishing of a complaint on the docket. Finally, the amendment excludes a uniform summons and complaint since a defendant receives a copy in hand at the time of service.

Advisory Committee Note – March 2005

[M.R. Crim. P. 10.] Rule 5B, referenced in Rule 10 was an experimental program regarding use of audiovisual devices. It was abrogated, effective August 1, 2004. Thus, the reference to it is deleted. A new Rule 5B, relating to felony cases that may have a first appearance in District Court, is adopted with these rule amendments.

RULE 11. PLEAS; SPECIAL CIRCUMSTANCES AS TO ACCEPTANCE OF CERTAIN PLEAS; NOTICE TO NONCITIZENS OF POTENTIAL ADVERSE IMMIGRATION CONSEQUENCES OF A PLEA

(a) Pleas for Any Crime.

(1) *In General.* A defendant may plead not guilty, not criminally responsible by reason of insanity, guilty, or nolo contendere. A defendant may plead both not guilty and not criminally responsible by reason of insanity to the same charge.

The court may refuse to accept a plea of guilty or nolo contendere.

If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or nolo contendere, the court shall enter a plea of not guilty.

(2) *Conditional Plea.* With the approval of the court and the consent of the attorney for the state, a defendant may enter a conditional plea of guilty or nolo contendere. A conditional plea shall be in writing. It shall specifically state any pretrial motion and the ruling thereon to be preserved for appellate review. If the court approves and the attorney for the state consents to entry of the conditional plea of guilty or nolo contendere, the parties shall file a written certification that the record is adequate for appellate review and that the case is not appropriate for application of the harmless error doctrine. Appellate review of any specified ruling shall not be barred by the entry of the conditional plea.

If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.

(b) Prerequisites to Accepting a Plea of Guilty or Nolo Contendere to a Class C or Higher Crime. Before accepting a plea of guilty or nolo contendere to a Class C or higher crime, the court shall ensure:

(1) That the plea is made with knowledge of the matters set forth in subdivision (c); and

(2) That the plea is voluntary within the meaning of subdivision (d); and

(3) That there is a factual basis for the charge, as provided in subdivision (e); and

(4) That an unrepresented defendant has knowingly and intelligently waived the defendant's right to counsel.

(c) Ensuring That the Plea Is Made Knowingly. Before accepting a plea of guilty or nolo contendere in a case involving a Class C or higher crime, the court shall address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The elements of the crime charged, the maximum possible sentence and any mandatory minimum sentence; and

(2) That by pleading guilty or nolo contendere the defendant is giving up the right to a trial, at which the defendant would have the following rights:

(A) The right to be considered innocent until proven guilty by the state beyond a reasonable doubt; and

(B) The right to a speedy and public trial by the court or by a jury; and

(C) The right to confront and cross-examine witnesses against the defendant; and

(D) The right to present witnesses on the defendant's behalf and the right to either be or decline to be a witness on the defendant's behalf.

(d) Ensuring That the Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere in a case involving a Class C or higher crime, the court shall determine that the plea is the product of the defendant's free choice and not the result of force, threats or promises other than those in connection with a plea agreement.

The court shall make this determination by addressing the defendant personally in open court.

The court shall inquire as to the existence and terms of a plea agreement, as provided in Rule 11A.

(e) Ensuring That There Is a Factual Basis for the Plea. Before accepting a plea of guilty or nolo contendere in a case involving a Class C or

higher crime, the court shall make such inquiry of the attorney for the state as shall satisfy it that the state has a factual basis for the charge.

(f) Acceptance of a Plea of Guilty to a Class C or Higher Crime Prior to Indictment. A defendant who, prior to indictment, desires to enter a plea of guilty to a charge of a Class A, B, or C crime may in writing waive the defendant's right to indictment by a grand jury as provided in Rule 7(b).

If the court refuses to accept the plea or the defendant, after executing the waivers, declines to plead guilty or if a plea of guilty is set aside, the waivers shall be considered withdrawn and the case shall proceed in accordance with these rules as if no waivers had been filed.

(g) Prerequisites to Accepting a Plea of Guilty or Nolo Contendere to a Class D or Class E Crime From an Unrepresented Defendant. Before accepting a plea of guilty or nolo contendere to a Class D or Class E crime from a defendant who is not represented by retained or appointed counsel or a lawyer for the day, other than as provided in subdivision (j), the court shall address the defendant personally in open court and make such inquiry as to ensure that the plea is knowing, intelligent, and voluntary.

(h) Potential Adverse Immigration Consequences to Noncitizens of a Plea to Any Crime. Before accepting a plea of guilty or nolo contendere for any crime, the court shall inquire whether the defendant was born in the United States. If, based on the defendant's answer, it appears that the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been advised of the risk under federal law of adverse immigration consequences, including deportation, as a result of the plea. If no such advice has been provided, or if the defendant is unrepresented, the court shall notify the defendant that the plea can create a risk of adverse immigration consequences, including deportation, and may continue the proceeding in order for counsel to provide the required advice, or, in the case of an unrepresented defendant, for investigation and consideration of the consequences by the defendant. The court is not required or expected to inform the defendant of the nature of any adverse immigration consequences.

(i) Transfer for Plea and Sentence. If a criminal charge for any crime is currently pending in a court, the defendant may, in writing, request permission to plead guilty or nolo contendere to any other crime the defendant has committed in the State, subject to the written approval of the attorneys for the state, if more than

one. Upon receipt of the defendant's written statement and of the written approval of the attorneys for the state the clerk of the court in which a complaint, an indictment or an information is pending shall transmit the papers in the proceeding to the clerk of courts for the court in which the defendant is held, and the prosecution shall continue in that court. The defendant's plea of guilty or nolo contendere constitutes a waiver of venue.

The court receiving a case transferred for plea and sentence shall issue an order that either requires the case to remain in the sentencing court or requires the case to be returned to the originating court.

(j) Acceptance of Guilty Plea by the Clerk to a Charge Punishable by a Fine. At the signed request of the defendant, the clerk of the court may accept a guilty plea upon payment of a fine as set by the court in the particular case, or as set by the court in accordance with a schedule of fines established by the court with the approval of the Chief Judge of the District Court for various categories of such crimes. Acceptance of a plea by the clerk shall be conditioned upon the defendant signing a form acknowledging that the defendant has read and understands the form and understands that, by entering the plea of guilty, the defendant is giving up all of the rights listed on the form, and that the plea will result in a criminal conviction, the punishment for which is the fine paid by the defendant.

Advisory Committee Note—1976

[M.R. Crim. P. 11(b).] This rule will formalize the current practice in the Superior Court and assure that any negotiated pleas are a matter of record. The text of the rule is based upon the provisions of the corresponding Federal Rule of Criminal Procedure.

Advisory Committee Note—1976

[M.R. Crim. P. 11(a).] This amendment accommodates the abolition of the felony misdemeanor distinction in the new Criminal Code, Title 17-A of the Maine Revised Statutes. It requires the detailed Rule 11 inquiry only in cases in which the offense charged is infamous, corresponding to the prior rule requiring the inquiry only in felony cases.

Advisory Committee Note—1980

[M.R. Crim. P. 11.] The redraft of Rule 11 has three purposes:

(1) To bring the rule into greater conformity with the governing case law, especially with respect to amplifying what the defendant must know as a prerequisite to a valid plea;

(2) To adopt some of the better practices incorporated in F.R. Crim. P. 11; and

(3) To dissolve an ambiguity as to what kind of plea agreements must be "accepted" or "rejected" by the judge.

Subdivision (a)

Subdivision (a) is derived from present Rule 11(a).

Subdivision (b)

Subdivision (b) serves as a roadmap of the remainder of the rule. The exception for Class D and Class E crimes carries forward the provision of present Rule 11(a).

Subdivision (c)

Subdivision (c) expands and simplifies the concepts which are presently compressed into the language "voluntarily with understanding of the nature of the charge" in present Rule 11(a). Case law requires that the court determine that the defendant understands more than the nature of the charge: principally, that the defendant understands what rights he is relinquishing and the maximum permissible sentence.

The requirement of explanation of the "elements" of the crime charged rather than its "nature" appears better practice after *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976).

Subdivision (c)(2) is derived from F.R. Crim. P. 11(c)(2)-(4) and Rule 444(b)(1) of the Uniform Rules of Criminal Procedure. Advising the defendant of at least some of the rights he is relinquishing is constitutionally required. *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Subdivision (d)

Subdivision (d) is derived from Fed. R. Crim. P. 11(d). "Voluntary" is used here not in the all-encompassing constitutional sense employed in cases like

Henderson v. Morgan, 426 U.S. 637 (1976), but in the narrower sense employed in Federal Rule 11(d). The term "free choice" is lifted from *North Carolina v. Alford*, 400 U.S. 25, 3191 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970) and *Davis v. State*, 106 A2d 127, 133 (Me. 1973).

Subdivision (e)

Subdivision (e) attempts to clarify what types of plea agreements must be accepted or rejected by the court and what types require no court acceptance or rejection. Four types of plea agreements are discerned.

Type A((e)(1)(A)) no longer requires court acceptance or rejection, due to the contemporaneous amendment of Rule 48(a), dispensing with court approval of dismissals.

Type B((e)(1)(B)) requites no court acceptance or rejection because the agreement is fulfilled by the silence of the attorney for the state.

Types C and D clarify and continue the requirement of court acceptance or rejection of a recommended disposition, consistent with the rationale of *Shorette v. State*, 402 A.2d 450 (Me. 1979).

Subdivision (e)(1) incorporates the guideline that a judge shall not participate in the negotiation of the specific terms of the plea agreement. This provision is derived from Fed. R. Crim. P. 11(e)(1).

Subdivision (e)(4) gives the court authority to enforce a plea agreement or permit withdrawal of the plea if the attorney for the state fails to comply with a plea agreement.

Subdivision (e)(5) replaces the provision making withdrawn pleas inadmissible in evidence (present (b)(4)) with a cross reference to M.R. Evid. 410 and continues the prohibition of admissibility of pleas of nolo contendere presently contained in Rule 11(b)(4).

Subdivision (f)

Subdivision (f) is intended to make clear that the court must make such inquiry of the attorney for the state as shall satisfy it that the state has a factual basis for the charge, but that it need not (although it may) make inquiry of the defendant himself. This is the teaching of *Morgan v. State*, 287 A.2d 592, 605-06 (Me. 1972); and *Clewley v. State*, 288 A.2d 468, 471 (Me. 1972).

Advisory Committee Note—1984

[M.R. Crim. P. 11(e)(3).] Although the court has discretion to follow, or to decline to follow, a recommended disposition, it typically has little information upon which to exercise that discretion. The amendment would require the parties to set forth on the record the reasons for the recommended disposition (for example, there may be problems of proof which lead the parties to compromise on sentence), thereby enabling the court to exercise informed discretion. This would also enable the court to satisfy the requirement in the contemporaneous amendment of Rule 32(a) that the court state its reasons if a sentence of imprisonment of one year or more is imposed.

Advisory Committee Note—1985

[M.R. Crim. P. 11(a).] The proposed Rule 11(a)(2) follows the new federal rule 11(a)(2), which was added effective August l, 1983.

The rationale of a conditional guilty plea was stated in the federal advisory committee note:

> [A] defendant who has lost one or more pretrial motions will often go through an entire trial simply to preserve the pretrial issues for later appellate review. This results in a waste of prosecutorial and judicial resources, and causes delay in the trial of other cases. . . . The Supreme Court has characterized the New York practice, whereby appeals from suppression motions may be appealed notwithstanding a guilty plea, as a "commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." *Lefkowitz v. Newsome*, 420 U.S. 283, 293 (1975). . . .

As the federal note states, the concept has found favor in standard works on criminal procedure:

> The development of procedures to avoid the necessity for trials which are undertaken for the sole purpose of preserving pretrial objections has been consistently favored by the commentators. See ABA Standards Relating to the Administration of Criminal

> Justice, standard 21-1.3(c) (2d ed. 1978); Model Code of Pre-Arraignment Procedure §§ 290.1(4)(b) (1975); Uniform Rules of Criminal Procedure, rule 444(d) (Approved Draft, 1974); 1 C. Wright, Federal Practice and Procedure—Criminal § 175 (1969); 3 W. LaFave, Search and Seizure § 11. l (1978).

While the conditional guilty plea would conserve trial resources, it would not unnecessarily burden appellate resources. A plea will be entered only if the defendant and defense counsel are satisfied that the chances of obtaining a not guilty verdict at trial are unacceptably slim and only if the attorney for the state and the court conclude:

(1) That the record is adequate for appellate review;

(2) That the case is not one appropriate for invocation of the harmless error doctrine; and

(3) That the plea is not entered for purposes of delay.

The requirements of court approval and prosecutorial consent are derived from the federal rule and are extensively discussed in the federal note.

It is contemplated that the principal use of this procedure would be with respect to evidentiary motions such as motions to suppress or motions in limine.

Advisory Committee Note—1987

[M.R. Crim. P 11(a)(1).] This amendment to subparagraph (1) is needed to bring it into conformity with P L. 1985, ch. 796, § 6 (effective July 16, 1986).

[M.R. Crim. P. 11(a)(2).] In proposing the conditional guilty plea procedure set forth in Rule 11(a)(2), the Advisory Committee followed the language and rationale of the federal version of Rule 11(a)(2).

The rationale of the requirement of court approval and prosecutorial consent was extensively discussed in the federal advisory committee note:

> The obvious advantages of the conditional plea procedure authorized by subdivision (a)(2) are not outweighed by any significant or compelling disadvantages. . . .

* * *

[Inadequate Record]

The claim that the lack of a full trial record precludes effective appellate review may on occasion be relevant. . . . However, most of the objections which would likely be raised by pretrial motion and preserved for appellate review by a conditional plea are subject to appellate resolution without a trial record. Certainly this is true as to the very common motion to suppress evidence, as is indicated by the fact that appellate courts presently decide such issues upon interlocutory appeal by the government.

[Harmless Error]

With respect to the objection that conditional pleas circumvent application of the harmless error doctrine. . . . the harmless error standard with respect to constitutional objections is sufficiently high, *see Chapman v. California*, 386 U.S. 18 [87 S. Ct. 824, 17 L. Ed. 2d 705] (1967), that relatively few appellate decisions result in affirmance upon that basis. Thus it will only rarely be true that the conditional plea device will cause an appellate court to consider constitutional questions which could otherwise have been avoided by invocation of the doctrine of harmless error.

[Requirement of Court Approval and Prosecutorial Consent]

To the extent that these or related objections would otherwise have some substance, they are overcome by the provision in Rule 11(a)(2) that the defendant may enter a conditional plea only "with the approval of the court and the consent of the government.". . . . The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial. . . . As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to

> try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay. . . .

Fed. R. Crim. P. 11(a)(2) advisory committee note to 1983 amend., 91 F.R.D. 289, 323 (1982).

Thus, both the federal and Maine provisions required court approval and prosecutorial consent to assure adequacy of the record, issue substantiality and acceptable timing. However, neither provision required the court or the prosecutor to file a written certification as to any of these points.

In *State v. Cyr*, 501 A.2d 1303, 1305 (Me. 1985), the Law Court said of the Maine provision:

> The rule is designed to conserve prosecutorial and court resources without creating an undue burden on the appellate process. In that regard, we require that both the prosecution and the trial court certify that the record is adequate for appellate review, that the case is not appropriate for application of the harmless error doctrine, and that the plea was not entered to delay the proceedings.

Following *Cyr* it is clear that Rule 11(a)(2) should be amended to explicitly require written certification of record adequacy and issue substantiality. It is not clear that anyone need explicitly certify as to no-delay purpose. If anyone is in a position to explicitly certify as to the purpose of the defendant's appeal, it is the defense. By giving their approval and consent, the court and the prosecutor implicitly certify as to the defendant's no-delay purpose. Such implicit certification should be enough to guard against frivolous appeals and certainly satisfies the rationale of the rule. See Federal Advisory Committee Note, supra.

Advisory Committee Note—1988

[M.R. Crim. P. 11(a)(1).] The amendment consolidates the language of several paragraphs of the rule for purposes of clarity.

Advisory Committee Note—1989

[M.R. Crim. P. 11.] Present Rule 11 has become cumbersome as it tries to deal with pleas, prerequisites to accepting pleas and plea agreements. New Rule 11A has been created to deal with plea agreements, containing provisions previously contained in Rules 11(e) and (g).

New Rule 11 carries forward the provisions dealing with pleas (former subdivision (a)) and prerequisites to accepting pleas (former subdivisions (b), (c), (d) and (f)). New subdivision (f) carries forward the provisions of former Rule 11A in authorizing the District Court to accept a plea of guilty to a charge of a Class C or higher crime. New subdivision (g) carries forward the provisions of Rule 20 in authorizing a plea of guilty to one or more additional charges.

New Rule 11A carries forward the provisions of former Rules 11(e) and (g). The requirements of disclosure of a plea agreement to the court and of a statement of reasons for certain plea agreements continue to be applicable as before. Thus in the case of a plea of guilty to a Class D or Class E crime, the District Court need not require notice of a plea agreement on the record in open court. New subdivision (h) is added to insure that an adequate record is made in the case of a negotiated plea of not criminally responsible by reason of insanity.

Advisory Committee Note—1990

[M.R. Crim. P. 11(a)(3).] Rule 11(a)(3) contains the language of former District Court Criminal Rule 10. This addition restores to the rules the authority of a District Court clerk to accept a guilty plea without an appearance by a defendant when a fine has been set in a specific case by a District Court judge or a schedule of fines has been approved by the Chief Judge of the District Court. No conflict with 4 M.R.S. § 164 is anticipated.

Advisory Committee Note—1996

[M.R. Crim. P. 11(a)(1).] The amendment eliminates the current requirement that a court enter a plea of not guilty in the event a defendant corporation fails to appear for arraignment. As a practical matter, a corporation that fails to appear for arraignment through counsel (M.R. Crim. P. 43) or otherwise, notwithstanding the existence of a properly served summons, is not likely to appear for trial either. Any response to nonappearance in the corporation context is complicated by the fact that a warrant of arrest cannot be used against a

nonindividual and a summons is probably not enforceable by contempt proceedings. 1 Cluchey & Seitzinger, *Maine Criminal Practice*, § 4.7 at II-22 and II-23 (1992). Although in certain circumstances a court may be able to make use of a remedial administrative remedy—see, e.g., a suspension under 29-A M.R.S. § 2605(1)—the criminal justice process is best served by halting the pre-trial process entirely until further investigation can be made by the prosecution into the reason for the nonappearance at arraignment by a defendant corporation.

Advisory Committee Note—2002

[M.R. Crim. P. 11.] It has become increasingly clear that what may appear to a defendant and defense counsel as an attractive plea agreement may contain a hidden danger of serious immigration consequences for a defendant who is not a United States citizen.

In *Aldus v. State*, 2000 ME 47, 748 A.2d 463, the Law Court held that it may constitute ineffective assistance of counsel for defense counsel, in special circumstances, to fail to explore with the defendant the immigration consequences of a guilty plea.

The purpose of the amendment is preventive; it seeks both to prevent an improvident plea and to prevent the burdens of post-conviction review. The amendment builds into the guilty plea proceeding a pause—a "stop-look-and-listen"—to ponder whether there may be serious immigration consequences of the plea. The amendment directs the court to alert defense counsel and unrepresented defendants that they may need to pause to explore hidden, serious immigration consequences of the plea.

The purpose of the amendment is not to furnish an additional ground for collateral attack on the plea, and failure to comply with the subdivision is not intended as a ground for collateral attack. The purpose of the amendment is to prevent collateral attack and to promote both fairness and finality.

Advisory Note – 2008

M.R.Crim.P. 11(a)(2). The amendment adds to the current conditional guilty plea, a conditional plea of nolo contendere. The same advantages to the parties and the court system in providing for a conditional guilty plea apply in the context of a nolo contendere plea. The amendment conforms Maine's conditional plea to that of its federal counterpart. *See* M.R.Fed.P. 11(a)(2).

The Law Court recently, while pointing out that the current rule "provides for conditional pleas of guilty only and does not authorize the entry of a conditional plea of nolo contendere," nonetheless addressed the merits of the issues raised in the context of a conditional plea of nolo contendere since "[t]he parties neither raised nor argued this point [the rule's inapplicability]." *State v. Dion*, 2007 ME 87, ¶ 1, n. 1, 928 A.2d 746, 747. *See also State v. Bilynsky*, 2007 ME 107, ¶ 3, n. 1, 932 A.2d 1169, 1171 ("The State . . . concedes "that there appears to be no rationale for allowing conditional guilty pleas and disallowing conditional nolo contendere pleas").

Advisory Note – 2009

M.R.Crim.P. 11 the heading (b) and (h). The amendment adds at the end of the current heading to Rule 11 "; NOTICE AS TO POSSIBLE IMMIGRATION CONSEQUENCES" for purposes of clarity. Further, it amends subdivision (h) in two respects. First, it adds the words "for any crime" in the first sentence to make clear that subdivision (h) applies to both felonies and misdemeanors since a plea to either may trigger immigration consequences. Second, it adds the words "by the defendant" at the end of the final sentence to make clear that the purpose for a trial court granting a continuance of the proceeding is for investigation and consideration by the defendant of any potential immigration consequences of the plea. With subdivision (h) amended to clarify that it applies to pleas to any class of crime, paragraph (5) of subdivision (b) becomes duplicative and is deleted. The sentence emphasizing that the court has no obligation to inform about or predict the nature of any possible immigration consequences of the plea is moved from paragraph (5) to subdivision (h).

Advisory Note – November 2011

Rule 11(h), is modified in light of *Padilla v. Kentucky*, 559 U.S. __, 130 S. Ct. 1473 (2010), holding that in the context of a plea by a noncitizen, to meet the Sixth Amendment's effective-assistance-of-counsel guarantee, defense counsel must advise the noncitizen client regarding the risk of deportation. More specifically, when it is "clear" under federal immigration law that the consequence of a particular plea is deportation, defense counsel must advise the noncitizen client of that fact. *Id.* at 1483. When, instead, the deportation consequences of a particular plea are "unclear or uncertain" under federal immigration law, defense counsel's obligation is satisfied by informing the noncitizen client that the plea "may carry a risk of adverse immigration consequences." *Id.* Despite these

modifications to the subdivision, the court itself has no obligation to inform the noncitizen about or predict the nature of any possible immigration consequences of the plea. *See* Advisory Note – 2009 to M.R. Crim. P. 11(h).

Advisory Note—July 2012

The amendment makes a number of nonsubstantive changes to Rule 11, all designed to enhance clarity. Specifically, it:

(1) makes the following changes to the rule's heading: deletes "**ACCEPTANCE OF A PLEA TO A CHARGE OF A CLASS C OR HIGHER CRIME**"; adds a new category of "**SPECIAL CIRCUMSTANCES AS TO ACCEPTANCE OF CERTAIN PLEAS**" referring to subdivision (a)(3) [redesignated subdivision(j)], (b) to (f), new (g), and (i) [formerly (g)]; and amends the current reference to subdivision (h) to read "**NOTICE TO NONCITIZENS OF POTENTIAL ADVERSE IMMIGRATION CONSEQUENCES OF A PLEA**";

(2) adds "**for Any Crime**" in the heading of subdivision (a);

(3) moves the special circumstance regarding acceptance of a plea and fine by the clerk addressed currently in subdivision(a)(3) to a new subdivision designated (j);

(4) restates the first sentence in subdivision (b) using a simpler approach;

(5) adds the words "knowingly and intelligently" to paragraph (4) of subdivision (b);

(6) replaces the word "insuring," or a variant thereof, with the word "ensuring," or a variant thereof, in subdivisions (b), (c), (d), and (e);

(7) adds the phrase "in a case involving a Class C or higher crime" to the first sentence of subdivisions (c), (d), and (e);

(8) replaces the word "relinquishing" with the words "giving up" in paragraph (2) of subdivision (c);

(9) adds the phrase "**Prior to Indictment**" in the heading of subdivision (f) and the words "by a grand jury" after the word "indictment" in its substance;

(10) redesignates current subdivision (g) as subdivision (i); and

(11) adds "for any crime" in the first sentence of the new subdivision (i).

In addition, the amendment to Rule 11 makes the following three substantive changes.

First, former subdivision (a)(3), now subdivision (j), is broadened to allow a clerk to accept pleas and fines under the same circumstances in both trial courts. Further, a new condition to the acceptance by a clerk is added requiring that the defendant file a signed form acknowledging that the defendant has read and understands the form and understands that, by entering the plea of guilty, the defendant is waiving all of his or her rights listed on the form, and that the plea will result in a criminal conviction, the punishment for which is the fine paid by the defendant.

Second, a new subdivision (g) has been added to address the prerequisites to a court accepting a plea of guilty or nolo contendere to a Class D or Class E crime from an unrepresented defendant. A lawyer, including a lawyer for the day, may obviate the need for a court to satisfy itself that the plea is knowing, intelligent, and voluntary if the court has expressly been advised that the lawyer has made an appropriate inquiry of the defendant to ensure the plea is knowing, intelligent, and voluntary.

In many instances, if there is no lawyer representing the defendant, the best practice for the presiding judge will be to have an individual colloquy with the defendant. That colloquy will allow the judge to ensure that the defendant understands the charge and that, by pleading guilty or nolo, the defendant will have a criminal conviction, and understands that she or he is giving up the right to a trial, including a jury trial; the right to be presumed innocent; the right to require the State to prove its case beyond a reasonable doubt; and the right to an attorney, including the right to be considered for an appointed attorney.

Third, the reference to recording of pleas offered in District Court in the last paragraph of subdivision (f) is deleted, as recording requirements for all criminal cases are comprehensively addressed in Rule 27.

RULE 11A. PLEA AGREEMENTS

(a) In General. The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged crime or to a lesser or related crime, any or all of the following will occur:

(1) The attorney for the state will dismiss other charges;

(2) The attorney for the state will not oppose the defendant's requested disposition;

(3) The attorney for the state will recommend a particular disposition; or

(4) Both sides will recommend a particular disposition.

The court may participate in the negotiation of the specific terms of the plea agreement at the request of or with the agreement of the parties.

(b) Notice of Plea Agreement. If a plea agreement has been reached by the parties, the Superior Court shall, on the record, require the disclosure of the agreement in open court at the time the plea is offered. If a plea agreement has been reached by the parties in the case of a plea of guilty to a Class C or higher crime in the District Court, the District Court shall, on the record, require the disclosure of the agreement in open court at the time the plea is offered.

(c) Statement of Reasons in the Case of a Class C or Higher Crime. If the plea agreement in the case of a Class C or higher crime includes a recommendation of the type specified in subdivision (a)(3) or (a)(4), the attorney for the state shall set forth on the record the reasons for the recommendation. In addition, in the case of a recommendation of the type specified in subdivision (a)(4), the attorney for the defendant shall set forth on the record the reasons for the recommendation.

Nothing herein shall relieve the parties of the obligation to present relevant facts to the court.

(d) Acceptance or Rejection by the Court of Recommendation Included in Plea Agreement. If the court accepts the recommendation, it may

embody in the judgment and sentence a disposition more favorable to the defendant than that recommended, but it may not embody in the judgment and sentence any disposition less favorable to the defendant than that recommended.

The court shall not reject the recommendation without giving the defendant the opportunity to withdraw his plea, as provided in subdivision (e).

The court may defer imposition of sentence pending an opportunity to consider the presentence report.

(e) Withdrawal of Plea Upon Rejection of Recommendation. If the plea agreement includes a recommendation of the type specified in subdivision (a)(3) or (a)(4), and if the court at the time of sentencing intends to enter a disposition less favorable to the defendant than that recommended, the court shall on the record inform the parties of this intention, advise the defendant personally in open court that the court is not bound by the recommendation, advise the defendant that, if the defendant does not withdraw the defendant's plea of guilty or nolo contendere the disposition of the case will be less favorable to the defendant than that recommended, and afford the defendant the opportunity to withdraw the defendant's plea. The court will, if possible, inform the defendant of the intended disposition.

(f) Compliance With Plea Agreement. If the plea agreement is of the type specified in subdivision (a)(1) or (a)(2) of this rule and if the attorney for the state fails to comply with the plea agreement, the court shall afford the defendant the opportunity to withdraw the defendant's plea or grant such other relief, including enforcing the plea agreement, as the court deems appropriate.

(g) Inadmissibility of Pleas, Offers of Pleas and Related Statements. The admissibility of evidence of a withdrawn plea of guilty or nolo contendere, or of offers or statements pertaining thereto, is governed by Rule 410 of the Maine Rules of Evidence. A plea of nolo contendere is not admissible in any civil or criminal proceedings against the person who made the plea.

(h) Acceptance of a Negotiated Plea of Not Criminally Responsible by Reason of Insanity. Before accepting a negotiated plea of not criminally responsible by reason of insanity, the court shall conduct a hearing and receive evidence sufficient to support a finding of insanity.

Advisory Committee Note—1971

[M.R. Crim. P. 11A.] Rule 11A is completely new and is required because of the adoption of Maine Laws, 1971, c. 175 granting jurisdiction to the District Court to accept pleas of guilty in felony cases. The first paragraph of the Rule makes the information procedure of Rule 7(b) applicable in the District Court after a defendant has been bound over and before he has been indicted. The defendant is required to execute a written waiver of appearance in the Superior Court. A copy of this waiver must be filed with the Clerk of Courts in order to clear the Superior Court docket since as soon as there is a bind over the papers in the case are forwarded to the Superior Court.

The second paragraph is designed to make clear that the Judges of the District Court must comply with the provisions of Rule 11. In the event the plea of guilty is not accepted or the defendant refuses to plead guilty, the waivers are considered withdrawn and the case must be presented to the grand jury.

The taking of guilty pleas frequently results in post-conviction petitions; it is therefore essential that the proceedings in the District Court be reported. Since there are no court reporters in District Court, electronic recording can be used as authorized by Maine Laws, 1971, c. 382. The District Court will have to develop some administrative procedures for preserving the tapes or recordings, but it did not seem necessary to include those in the Rule.

Advisory Committee Note—1983

[M.R. Crim. P. 11A.] The amendment proceeds from the perception that a bindover hearing need no longer be a necessary predicate to the exercise of the jurisdiction conferred by 17-A M.R.S. § 9(3).

The amendment to the second paragraph corrects an erroneous cross reference.

Advisory Committee Note—1989

[M.R. Crim. P. 11A.] Present Rule 11 has become cumbersome as it tries to deal with pleas, prerequisites to accepting pleas and plea agreements. New Rule 11A has been created to deal with plea agreements, containing provisions previously contained in Rules 11(e) and (g).

New Rule 11 carries forward the provisions dealing with pleas (former subdivision (a)) and prerequisites to accepting pleas (former subdivisions (b), (c), (d) and (f)). New subdivision (f) carries forward the provisions of former Rule 11A in authorizing the District Court to accept a plea of guilty to a charge of a Class C or higher crime. New subdivision (g) carries forward the provisions of Rule 20 in authorizing a plea of guilty to one or more additional charges.

New Rule 11A carries forward the provisions of former Rules 11(e) and (g). The requirements of disclosure of a plea agreement to the court and of a statement of reasons for certain plea agreements continue to be applicable as before. Thus in the case of a plea of guilty to a Class D or Class E crime, the District Court need not require notice of a plea agreement on the record in open court. New subdivision (h) is added to insure that an adequate record is made in the case of a negotiated plea of not criminally responsible by reason of insanity.

Advisory Note – 2008

The amendment to M.R. Crim. P. 11A(a) clarifies the current limitation on a court participating "in the negotiation of the specific terms of the plea agreement" by making a positive statement regarding the court's capacity to participate in such negotiations. The purposes of the amendment are to (1) avoid confusion with M.R. Crim. P. 11A(e) in which the court is required to disclose its view of an appropriate sentence in certain negotiated pleas, and (2) promote sound policy and good judicial case management practice, while retaining the protection of the due process rights of the defendant and the prosecutorial role of the attorney for the State as a member of the Executive Department.

The amendment supports maintenance of current judicial practices that encourage the parties, with participation of the court, to engage in meaningful plea negotiation discussions. Further, the amendment recognizes that a justice or judge may explore the current state of party pre-plea discussions, including the specific terms under consideration by the parties and may facilitate a plea agreement by suggesting or addressing a specific aspect of the pre-plea discussions when requested by the parties to do so.

The amendment contemplates that the court and the parties should continue to respect the core interests identified in *Matter of Cox*, 553 A.2d 1255, 1257-58 (Me. 1989) – namely, avoiding risk of coercion of the defendant; avoiding risk of coercion of the attorney for the state; promoting judicial efficiency; and preserving public respect for the judiciary. To avoid concerns about coercion, courts, in plea

negotiation discussions, should (1) avoid suggestions to defendants or defense counsel that the refusal to enter a plea may lead to a higher sentence than otherwise may be appropriate if there is a conviction after trial, and (2) avoid suggestions to prosecutors that failure to agree to a plea may result in dismissal of a charge, a lower sentence than otherwise may be appropriate if there is a conviction after trial, or adverse consequences in other cases. These comments recognize that a trial is a live, dynamic event in which facts may be disclosed or observed that, if there is a conviction, may support a sentence very different from a sentence that may have been contemplated prior to trial. *See State v. Farnham,* 479 A.2d 887, 889-93 (Me. 1984).

RULE 11B. FILING AGREEMENT

(a) In General. The attorney for the state and the defendant may enter into a written filing agreement respecting a pending indictment, information or complaint. The filing agreement must establish a definite filing period of up to one year subject to the conditions, if any, set forth in the filing agreement. Upon execution of the agreement by the parties, the state shall file the agreement forthwith in the trial court and, upon such filing, the agreement will become effective.

(b) Court Approval Unnecessary. The approval of the court for the filing of a written filing agreement by the parties is unnecessary; however, a filing agreement is subject to the control of the court. If the agreement calls for the payment by the defendant of costs of prosecution, such agreed-upon costs may be in any amount up to, but not exceeding, the maximum authorized fine amount for the particular crime based upon its sentencing class and need not reflect the actual costs of prosecution.

(c) Disposition During or at Expiration of Filing Period. Except where a filing agreement expressly provides otherwise as specified in subdivision (d), if the defendant has satisfied each of the filing agreement's conditions, if any, at the conclusion of the agreed upon filing period the defendant is entitled to have the filed indictment, information or complaint dismissed with prejudice. In this regard, unless the attorney for the state files a motion alleging a violation of one or more of the agreement's conditions by the defendant and seeking to have the criminal proceeding in which the indictment, information or complaint was filed reactivated by the court, at the expiration of the filing period the clerk shall enter a dismissal of the filed charging instrument with prejudice. In the event the attorney for the state files a motion during or at the end of the filing period alleging a

violation of one or more of the agreement's conditions, the attorney for the state is entitled to have the criminal proceeding reactivated by the court if, following a hearing on the motion, the court finds by a preponderance of the evidence that the defendant has violated one or more of the agreement's conditions.

(d) Special Reservations in the Filing Agreement. If the attorney for the state wishes to preserve the right to reinitiate a criminal proceeding after the filing period has fully run when no breach of conditions has occurred, or to preserve the right to initiate the same or additional criminal charges against the defendant arising out of the same event or conduct in a separate criminal proceeding while the filing period is running, the attorney for the state must expressly reserve such a right in the written filing agreement and the defendant must expressly agree to it.

Advisory Note – 2009

M.R.Crim.P. 11B. New Rule 11B comprehensively addresses filing agreements entered into by the attorney for the state and the defendant. It replaces current subdivision (c) of Rule 48. Unlike Rule 48(c) which focuses on a filing by the parties as a form of dismissal of a pending charging instrument, Rule 11B focuses on filing by the parties as a form of plea agreement in response to the Law Court's recent decision in *State v. Russo*, 2008 ME 31 942 A.2d 694. *Russo* thoroughly discusses party filings in this context.

Proposed Rule 11B is made up of four subdivisions. Subdivision (a) authorizes the parties to enter into written filing agreements respecting a formal charge, with or without conditions (including a condition requiring payment of costs of prosecution), for a definite filing period of no more than one year. The one year limitation is consistent with current Rule 48(c).

Subdivision (b) provides that approval of the trial court for the filing of a written filing agreement by the parties is unnecessary even in the context of agreed-upon payment of costs of prosecution. Thus subdivision (b) eliminates the current requirement of Rule 48(c) that costs of prosecution in excess of $500 require a court finding that the costs "reflect the actual costs of prosecution." It leaves to the parties to settle on an agreed-upon cost figure "in any amount up to, but not exceeding, the maximum authorized fine amount for the particular crime based upon its sentencing class and need not reflect the actual costs of prosecution." However, even though court approval is unnecessary for the filing of a written filing agreement by the parties, including, agreed-upon costs,

subdivision (b) further provides that a filing agreement is always subject to the control of the court.

Subdivision (c) provides, except with special reservations in the filing agreement, that at the conclusion of the agreed-upon filing period, if the defendant has satisfied each of the agreed-upon filing conditions, the defendant is entitled to have the filed charging instrument dismissed with prejudice rather than without prejudice as currently under Rule 48(c). The "with prejudice" consequence is consistent with the *Russo* decision. *Id.* It further provides that the attorney for the state may, during or at the end of the filing period, file a motion alleging a violation of one or more of the agreement's conditions by the defendant and seeking reactivation of the criminal proceeding. At the subsequent hearing on that motion, subdivision (c) provides that the attorney for the state is entitled to have the criminal proceeding reactivated by the trial court if the court finds by a preponderance of the evidence that the defendant has violated one or more of the agreement's conditions. Current Rule 48(c) does not address the role of the attorney for the state relative to reactivation other than to allude to "action [by the attorney for the state] to bring the indictment, information or complaint to the attention of the court during the period of filing."

Subdivision (d) provides that if the attorney for the state wishes to preserve the right to reinitiate a criminal proceeding after the filing period has fully run when no breach of conditions has occurred, or to preserve the right to initiate the same or additional criminal charges against the defendant out of the same event or conduct in a separate criminal proceeding while the filing period is running, the attorney for the state must expressly reserve such a right in the written filing agreement and the defendant must expressly agree to it. These special reservations are not addressed in current Rule 48(c). They instead are addressed in the *Russo* decision. *Id.* ¶ 19, n.3, 942A.2d at 700.

Advisory Note – March 2010

M.R. Crim. P. 11B(a). The amendment adds a new final sentence that both imposes upon the state the obligation to file the written agreement forthwith once executed and signifies when the executed agreement becomes effective—that is, when it is filed by the state in the trial court and not before.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the complaint, the indictment and the information and the pleas of not guilty, not criminally responsible by reason of insanity, guilty and nolo contendere. All other pleas and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore would have been raised by one or more of such other pleas or pleadings shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. The motion shall include all such defenses and objections available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment, information, or complaint to charge an offense shall be noticed and acted upon by the court at any time during pendency of the proceeding.

(3) *Time of Making Motion.* All motions shall be filed within 21 days after entry of a plea unless the court specifies a different time.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. All issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant, the defendant shall be permitted to plead if the defendant has not previously pleaded. A plea previously entered shall stand. If the motion is based

upon a defect which may be cured by amendment of the complaint or information, the court may deny the motion and order that the complaint or information be amended. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, information or complaint the defendant shall be discharged.

(c) Motion In Limine. The defendant or the state may make a pretrial motion requesting a pretrial ruling on the admissibility of evidence at trial or on other matters relating to the conduct of the trial. The court may rule on the motion or continue it for a ruling at trial. In determining whether to rule on the motion or to continue it, the court should consider the importance of the issue presented, the desirability that it be resolved prior to trial, and the appropriateness of having the ruling made by the justice or judge who will preside at trial. For good cause shown the justice or judge presiding at trial may change a ruling made in limine.

Advisory Committee Note—1975

[M.R. Crim. P. 12(a) and (b)(2).] This amendment is to implement Maine Laws, 1975, Chapter 139.

Advisory Committee Note—1981

[M.R. Crim. P. 12(c).] A motion in limine can be a valuable tool in the pretrial shaping of the trial. *See Maine Evidence*—1980 Supplement, § 103.7. The Federal Rules contain such a provision, F.R.Cr.P. 12(b), although it contains a good deal more complexity than the provision proposed here. *See United States v. Barletta*, 644 F.2d 50 (lst Cir. 1981).

The purpose of this provision is simply to authorize the motion, without binding the court to a pretrial ruling upon it. For example, the court may decline to make a pretrial ruing because the motion is filed so close to the eve of trial that the justice presiding at trial should rule upon it.

The provision makes clear that the justice presiding at trial may change the pretrial ruling in appropriate circumstances. In *State v. O'Neal,* 432 A.2d 1278, 1282, n.8 (Me. 1981), this power was recognized by the trial justice (although not exercised). If the pretrial ruling is changed, the court should consider granting a continuance to avoid prejudice.

The provision does not affect the traditional motion to suppress based upon a constitutional violation. It does plug whatever gaps may exist between Rule 12 and Rule 41. *Cf. State v. Perkins*, 275 A.2d 586 (Me. 1971), *with State v. Baker*, 423 A.2d 227 (Me. 1980).

Advisory Committee Note—1982

[M.R. Crim. P. 12(b)(2) and (3).] The defendant is given until 21 days after arraignment to file any pretrial motions. District Court Rule 12(b)(3). A parallel amendment is made to Criminal Rule 12(b)(3).

The purposes of both amendments are to standardize the practice regarding filing of motions, to avoid the practice of filing motions close to the trial date as an excuse to delay trial and to end the uncertainty regarding which motions must be filed before arraignment.

RULES 13 AND 14. [RESERVED]

RULE 15. DEPOSITIONS

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material and that it is necessary to take the witness' deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information or complaint may upon motion and notice to the parties order that the witness' testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) Defendant's Counsel. If a defendant is without counsel the court shall advise the defendant of the defendant's right and assign counsel to represent the defendant pursuant to Rule 44.

(d) How Taken. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if the court finds: That the witness is dead; or that the witness is out of the State of Maine, unless the court finds that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the party offering part of a deposition to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(g) At the Instance of the State or Witness. The following additional requirements shall apply if the deposition is taken at the instance of the state or witness. The officer having custody of a defendant shall be notified of the time and place set for the examination, shall produce the defendant at the examination and shall keep the defendant in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination.

Advisory Committee Note—1978

[M.R. Crim. P. 15(a).] Rule 15(a) is amended to make it possible to take the deposition of a material witness under appropriate circumstances after complaint has been filed in the District Court. There have been instances in which serious crimes have been committed against transients who will not be available at the time of trial and whose testimony cannot presently be preserved by deposition until after an indictment has been returned. The amendment solves this problem.

Advisory Committee Note—1989

[M.R. Crim. P. 15(a) and (c).] The last two sentences of Rule 15(a) have been transferred to Rude 46(g) because they deal with the case of a material witness who is detained for failure to make bail. It authorizes release of the witness upon the taking of the witness's deposition.

Advisory Committee Note—2003

[M.R. Crim. P. 15(c) and (g).] The amendment deletes from both subdivisions (c) and (g) the provisions allowing for or requiring a court to direct that payment of "expenses of travel and subsistence for attendance" at a deposition relative to either a defendant or a defendant's attorney be borne by the "county in which the case is pending." In 1975 the 107th Legislature provided for state financing of court expenses rather than the counties. *See* P.L. 1975, ch. 383. Today, payment of expenses incurred by court-appointed counsel in the context of a deposition, including travel and subsistence for attendance, are addressed by way of administrative order of the Supreme Judicial Court. *See* Fee Schedule for Court-Appointed Counsel in All Courts, Admin. Order M.S.J.C. (adopted effective July 1, 2000) and its addendum (adopted effective July 1, 2000). Expenses of travel and subsistence for attendance at a criminal deposition incurred either by private counsel or by a defendant are neither addressed by administrative order nor by statute at the present time.

RULE 16. DISCOVERY BY THE DEFENDANT

(a) Automatic Discovery.

(1) *Duty of the Attorney for the State.* The attorney for the state shall furnish to the defendant within a reasonable time:

(A) A statement describing any testimony or other evidence intended to be used against the defendant which:

(i) Was obtained as a result of a search and seizure or the hearing or recording of a wire or oral communication;

(ii) Resulted from any confession, admission, or statement made by the defendant; or

(iii) Relates to a lineup, showup, picture, or voice identification of the defendant.

(B) Any written or recorded statements and the substance of any oral statements made by the defendant.

(C) A statement describing any matter or information known to the attorney for the state which may not be known to the defendant and which tends to create a reasonable doubt of the defendant's guilt as to the crime charged.

(D) A copy of any notification provided to the Superior Court by the attorney for the state pursuant to Rule 6(h) that pertains to the case against the defendant.

(2) *Continuing Duty to Disclose.* The attorney for the state shall have a continuing duty to disclose the matters specified in this subdivision.

(3) *Charge of a Class D or Class E Crime in District Court.* Discovery shall be provided to a defendant charged with a Class D or Class E crime in District Court within 10 days of arraignment.

(b) Discovery Upon Request.

(1) *Duty of the Attorney for the State.* Upon the defendant's written request, the attorney for the state, except as provided in subdivision (3), shall allow access at any reasonable time to those matters specified in subdivision (2) which are within the attorney for the state's possession or control. The attorney for the state's obligation extends to matters within the possession or control of any member of the attorney for the state's staff and of any official or employee of this state or any political subdivision thereof who regularly reports or with reference to the particular case has reported to the attorney for the state's office. In affording this access, except as otherwise limited by 15 M.R.S. § 1121 relative to sexually explicit material, the attorney for the state shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.

(2) *Scope of Discovery.* The following matters are discoverable:

(A) Any books, papers, documents, photographs (including motion pictures and video tapes), tangible objects, buildings or places, or copies or

portions thereof, which are material to the preparation of the defense or which the attorney for the state intends to use as evidence in any proceeding or which were obtained or belong to the defendant;

(B) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(C) The names and, except as provided in Title 17-A M.R.S. § 1176(4), the addresses of the witnesses whom the state intends to call in any proceeding;

(D) Written or recorded statements of witnesses and summaries of statements of witnesses contained in police reports or similar matter;

(E) The dates of birth of the witnesses the state intends to call in any proceeding.

The fact that a listed witness is not called shall not be commented upon at trial.

(3) *Exception: Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the attorney for the state or members of his or her legal staff.

(4) *Continuing Duty to Disclose.* If matter which would have been furnished to the defendant under this subdivision comes within the attorney for the state's possession or control after the defendant has had access to similar matter, the attorney for the state shall promptly so inform the defendant.

(5) *Charge of a Class D or Class E Crime in District Court.* Discovery shall be provided to a defendant charged with a Class D or Class E crime in District Court within 10 days of the request.

(6) *Protective Order.* Upon motion of the attorney for the state, and for good cause shown, the court may make any order which justice requires.

(c) Discovery Pursuant to Court Order.

(1) *Bill of Particulars.* The court for cause may direct the filing of a bill of particulars if it is satisfied that counsel has exhausted the discovery remedies under this rule or it is satisfied that discovery would be ineffective to protect the rights of the defendant. The bill of particulars may be amended at any time subject to such conditions as justice requires.

(2) *Grand Jury Transcripts.* Discovery of transcripts of testimony of witnesses before a grand jury is governed by Rule 6.

(3) *Order for Preparation of Report by Expert Witness.* If an expert witness whom the state intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and the attorney for the state serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify and a summary of the expert's opinions and the grounds for each opinion.

(d) Sanctions for Noncompliance. If the attorney for the state fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the state to comply, granting the defendant additional time or a continuance, relieving the defendant from making a disclosure required by Rule 16A, prohibiting the attorney for the state from introducing specified evidence and dismissing charges with prejudice.

Advisory Committee Note—1978

[M.R. Crim. P. 16.] Former Rule 16 dealt with both discovery by the defendant and discovery by the State. Former Rule 16(a) provided a certain amount of limited discovery by the defendant pursuant to court order upon the defendant's motion. Former Rule 16(b) provided discovery by the State of certain aspects of the defendant's alibi defense. Discovery by the defendant is now governed by Rule l6; discovery by the State is now governed by Rule 16A. The overriding purpose of the amendment is to enlarge, clarify and simplify discovery procedures so as to make the criminal trial a fairer search for truth.

New Rule 16 somewhat enlarges the scope of discoverable material. But the more important purpose of the amendment is to distinguish those matters which should continue to be discoverable only by court order from those matters which

can and should be furnished by the prosecuting attorney automatically or upon request.

Automatic discovery or discovery upon request reflects the modern trend. Standards 1.4 of the *ABA Standards Relating to Discovery and Procedure Before Trial* endorses automatic discovery, urging the court to "encourage effective and timely discovery conducted voluntarily and informally between counsel." Federal Rule of Criminal Procedure 16 was amended effective December 1, 1975 to provide for reciprocal discovery upon request without the necessity of court order. The Uniform Rules of Criminal Procedure endorse both automatic discovery and discovery upon request.

Informal discovery cannot be expected to work in timely and effective fashion unless counsel are given guidance as to what matters are discoverable and upon what basis. Rule 16 is amended to separately specify those matters which should be furnished automatically (subdivision (a)), those matters which should be furnished upon request (subdivision (b)) and those matters which should be furnished pursuant to court order (subdivision (c)).

Subdivision (a) is derived from Uniform Rule of Criminal Procedure 422(a). It is designed to eliminate wasted time and effort occasioned by defense counsel's attempts to discover matters not in existence. Subdivision (a)(1)(A) does not require a summary but only a list of the evidentiary matters. Subdivision (a)(1)(A)(i) purposely avoids using the term "interception" of a wire or oral communication because of the term's narrow statutory definition. See 15 M.R.S. § 709(4). Subdivision (a)(1)(C) implements the constitutional standard enunciated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2342, 49 L. Ed. 2d 342 (1976). It obviates the need for defense counsel to go on a fishing expedition for "*Brady* material."

Subdivision (b) is derived from F.R.Cr.P. 16(a) and Uniform Rule 421. The matters discoverable under subdivision (b)(2) were previously discoverable under Criminal Rule 16 only by court order. Subdivision (b) follows the lead of the ABA Standards, Federal Rule 16 and the Uniform Rules of Criminal Procedure in dispensing with the need for a court order.

Subdivision (c)(1)(B) retains the necessity for a court order to discover the written or recorded statements of witnesses.

Subdivision (c)(1)(C) provides that in appropriate circumstances the attorney for the State may be required to furnish to the defendant a statement, usually from the State Bureau of Identification, listing the witness's record of prior criminal convictions. This provision is subject to two requirements imposed by subdivision (c)(1). First, since the record must be material to the preparation of the defense, the attorney for the State may show that use of the record would be barred by Rule 609 of the Maine Rules of Evidence. Second, since the request must be reasonable, if the record is not within the possession, custody or control of the attorney for the State, the request may not be considered reasonable. In *State v. Toppi*, 275 A.2d 805, 812, n.6 (Me. 1971), the Law Court outlined certain circumstances in which the attorney for the State would be required to obtain and furnish a record not in the possession of the State. On the other hand, the attorney for the State should not be routinely required to obtain and furnish the record if the defendant may readily obtain it by subpoena. *See State v. Burnham,* 350 A.2d 577 (Me. 1976), construing former Rule 16(a). Given the limitations on access to criminal history record information contained in 16 M.R.S. §§ 601-607, such access may prove difficult. Thus, the appropriateness of requiring the attorney for the State to obtain and furnish the record is left to the sound discretion of the presiding justice. Because 16 M.R.S. § 606 provides a procedure for discovery by the defendant of his own criminal record, no discovery provision need be made in these rules.

Subdivision (c)(2) contains the provisions governing a bill of particulars which were previously found in Criminal Rule 7(f). The transfer was made in order to emphasize the discovery function of a bill of particulars.

In *State v. Wedge,* 322 A.2d 328, 330-31 (Me. 1974), the Law Court defined the function of a bill of particulars by quoting with approval the following language from *United States v. Leach*, 427 F.2d 1107, 1110 (lst Cit. 1970) and adding its own emphasis:

> The function of a bill of particulars is to protect against jeopardy, provide the accused with sufficient detail of the charges against him where necessary to the preparation of his defense and *to avoid prejudicial surprise at trial.* (Emphasis added.)

Cf. *State v. Benner,* 284 A.2d 91, 98 (Me. 1971).

Subdivision (c)(2) makes clear that a bill of particulars should not be granted unless it remains necessary once the other discovery remedies provided by this rule have been exhausted.

Subdivision (c)(3) transfers provisions governing the discovery of transcripts of testimony of witnesses before a grand jury to Rule 6(e). This transfer is appropriate because Rule 6(e) provides for the secrecy of grand jury proceedings.

No provision for discovery from the attorney for the State of the criminal records of prospective jurors is made at this time. The Advisory Committee strongly believes that if the attorney for the State obtains these criminal records for screening jurors, then they should be shared with defense counsel. The Committee doubts the utility of these records in selecting an impartial jury particularly as measured against the costs to the right of privacy of prospective jurors. But whatever utility the attorney for the State finds in these records should be equalized with the defense. The Committee would prefer to see settled the question of the propriety of this practice by an attorney for the State before this burden on the jurors' privacy is extended.

Subdivision (d) is derived from Uniform Rule 421(e). Naturally, the sanction of dismissal with prejudice should be reserved for extreme cases.

Advisory Committee Note—1983

[M.R. Crim. P. 16(b)(2).] The amendment is designed to ensure timely disclosure to the defense of the identity and location of the State's trial experts expected to be called in the State's case-in-chief.

Advisory Committee Note—1985

[M.R. Crim. P. 16(a)(1).] See Note to Rule 6(h).

[Note to Amendment to Rule 6(h): Proposed section (h) provides for limited disclosure of information or exhibits for certain law enforcement purposes. This section does not supersede the requirement of Rule 6(e) for disclosure of a grand jury transcript.

This section is not intended to derogate from the right of the defendant to request discovery pursuant to Rule 16(b) of whatever reports or statements are made by the person to whom disclosure is made. To implement this right a

contemporaneous amendment is made to Rule 16(a) to require the attorney for the state to notify the defendant of the contents of the disclosure order.]

Advisory Committee Note—1986

[M.R. Crim. P. 16(b)(2)(C).] The amendment expands the scope of discovery to include pretrial proceedings, such as motions to suppress.

[M.R. Crim. P. 16(c)(3).] The amendment makes clear that discovery of transcripts of testimony of grand jury witnesses is governed by Rule 6 generally.

[M.R. Crim. P. 16(c)(4).] Rule 16(c)(4) is amended to remedy the situation where an expert witness does not provide a written report and discovery under Rule 16(b) is thereby frustrated.

Advisory Committee Note—1987

[M.R. Crim. P. 16(b)(2)(A).] This amendment is needed for consistency with similar amendments to Rules 16(b)(2)(C) and 16A(c) and (d), effective February 15, 1986.

Advisory Committee Note—1988

[M.R. Crim. P. 16(c)(1).] The amendment reparagraphs Rule 16(c)(1) to make clear that the language following Paragraph (C) applies to all of Rule 16(c)(1).

Advisory Committee Note—1991

[M.R. Crim. P. 16.] The proposed amendment was prompted by a letter to the Committee from the Chief Justice of the Superior Court, which read in part:

> The Superior Court has been flooded with motions for discovery in almost every criminal ease filed for various reasons. I would appreciate the Criminal Rules Committee considering the possibility of amending the rules. . . . [to] eliminate the necessity of routine filings of discovery motions. There obviously are some situations in which discovery motions are necessary . . . , but the vast majority of these motions are filed routinely just to 'protect the record.' (Letter from Chief Justice Brody of February 13, 1990)

The proposed amendment shifts the discovery of the state's witnesses from the category of court-ordered discovery to the category of requested discovery. This change eliminates routine defense motions, and necessitates a motion only when the attorney for the state resists discovery and seeks a protective order. Supplying the date of birth of a prospective witness allows defense counsel to obtain the person's criminal record history.

Advisory Note – 2009

M.R.Crim. P. 16(a)(1)(D). Subparagraph (D) is amended to reflect the 1997 amendment to Rule 6(h). *See* Me.Rptr. 692-698 A.2d LXVII, LXXXI-LXXXII. Specifically, in 1997 Rule 6(h) was amended so as to eliminate the court-order requirement regarding a prosecutor's disclosure to law enforcement personnel of matters occurring before the grand jury and in its stead to provide for after-the-fact written notification to the Superior Court by the prosecutor as to whom disclosure was made and certification as to advising such person or persons of the obligation of secrecy under Rule 6. Subparagraph (D) is amended to require that a copy of any such notification that pertains to the case against the defendant be forwarded to the defendant.

M.R.Crim.P. 16(b)(2)(C). P.L. 2007, ch. 475, § 13 repealed and replaced 17-A M.R.S. § 1176, effective June 30, 2008, relating to confidentiality of victims records. New subsection 4 of section 1176 provides:

> **4. Limited disclosure pursuant to discovery.** Notwithstanding the provisions of the Maine Rules of Criminal Procedure, Rule 16, an attorney for the State may withhold the current address or location of a victim from a defendant, or the attorney or authorized agent of the defendant, if the attorney for the State has a good faith belief that such disclosure may compromise the safety of the victim.

The amendment to Rule 16(b)(2)(C) expressly incorporates the new statutory exception.

Advisory Note – November 2011

The amendment modifies paragraph (1) of subdivision (b) of Rule 16 by providing notice of the existence of the new statutorily-imposed limitations on the attorney for the state regarding a defendant's access to sexually explicit material in

any criminal proceeding pursuant to 15 M.R.S. § 1121, enacted by P.L. 2011, ch. 39, § 1, effective September 28, 2011. "Sexually explicit material" is defined in 15 M.R.S. § 1121(1) to mean "the property or material described in Title 17-A, chapter 12."

RULE 16A. DISCOVERY BY THE STATE

(a) Automatic Discovery. Notice of Intention to Introduce Expert Testimony as to the Defendant's Mental State. If a defendant intends to introduce expert testimony as to the defendant's mental state, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve a notice of such intention upon the attorney for the state and file a copy with the clerk. Mental state testimony includes culpable state of mind, mental disease or defect, belief as to self-defense, or any other mental state or condition of the defendant bearing upon the issue of criminal liability. The court may for cause shown allow late filing of the notice; if it does so, it may grant additional time to the parties to prepare for trial or may make such further order as may be appropriate. The notice is not admissible against the defendant.

(b) Discovery Upon Request.

(1) *Documents and Tangible Objects.* Upon the written request of the attorney for the state, the defendant shall, within a reasonable time, permit the attorney for the state to inspect and copy or photograph or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding.

(2) *Expert Witnesses.* Upon the written request of the attorney for the state, the defendant shall, within a reasonable time, furnish to the attorney for the state:

(A) A statement containing the name and address of any expert witness whom the defendant intends to call in any proceeding;

(B) A copy of any report or statement of an expert, including a report or results of physical or mental examinations and of scientific tests, experiments, or comparisons, which is within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding.

(3) *Notice of Alibi.* No less than 10 days before the date set for trial, the attorney for the state may serve upon the defendant or the defendant's attorney a demand that the defendant serve a notice of alibi if the defendant intends to rely on such defense at the trial. The demand shall state the time and place that the attorney for the state proposes to establish at the trial as the time and place where the defendant participated in or committed the crime. If such a demand has been served, and if the defendant intends to rely on the defense of alibi, not more than 5 days after service of such demand, the defendant shall serve upon the attorney for the state and file a notice of alibi which states the place which the defendant claims to have been at the time stated in the demand and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Within 5 days thereafter, the attorney for the state shall file and serve the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the time and place stated in the demand.

If the defendant fails to serve and file a notice of alibi after service of a demand, the court may take appropriate action. If the attorney for the state fails to serve and file a notice of witnesses, the court shall order compliance. The fact that a witness' name is on a notice furnished under this subdivision and that the witness is not called shall not be commented upon at trial.

(4) *Exception: Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent they contain the mental impressions, conclusions, opinions, or legal theories of the attorney for the defendant.

(5) *Continuing Duty to Disclose.* If matter which would have been furnished to the attorney for the state under this subdivision comes within the attorney for the defendant's possession or control after the attorney for the state has had access to similar matter, the attorney for the defendant shall promptly so inform the attorney for the state.

(6) *Protective Order.* Upon motion of the defendant, and for good cause shown, the court may make any order which justice requires.

(c) Discovery Pursuant to Court Order.

(1) *Order for Preparation of Report by Expert Witness.* If an expert witness whom the defendant intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert

prepare and the defendant serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and the grounds for each opinion.

(2) *Order Permitting Discovery of the Person of the Defendant.*

(A) Upon motion and notice the court may order a defendant to:

(i) Appear in a line-up;

(ii) Speak for identification by witnesses to a crime;

(iii) Be fingerprinted, palmprinted, or footprinted;

(iv) Pose for photographs;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under the defendant's fingernails;

(vii) Permit the taking of samples of the defendant's biological materials, including but not limited to, blood, hair, saliva, fingernail clippings and materials obtainable by swab;

(viii) Provide specimens of the defendant's handwriting; and

(ix) Submit to a reasonable physical or medical inspection of the defendant's body.

(B) Reasonable notice of the time and place of any personal appearance of the defendant required for the foregoing purposes shall be given by the attorney for the state to the defendant and the defendant's attorney. Provision may be made for appearances for such purposes in an order by the court admitting the defendant to bail or providing for the defendant's release.

(C) Definition. For purposes of this Rule, a defendant is a person against whom a criminal pleading has been filed.

(d) Sanctions for Noncompliance. If the defendant fails to comply with this rule, the court on motion of the attorney for the state or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the defendant to comply, granting the attorney for the state additional time or a continuance, relieving the attorney for the state from making a disclosure required by Rule 16, prohibiting the defendant from introducing specified evidence and charging the attorney for the defendant with contempt of court.

Advisory Committee Note—1978

[M.R. Crim. P. 16A.] Subdivision (a) allows the attorney for the State to move the court for an identification order. The order will be granted if an appropriate showing of need is made and the request is reasonable under all the circumstances. The terms and conditions of the court order will provide for appropriate medical safeguards and other reasonable protections of the defendant.

Identification procedures without a court order have been upheld when the defendant was in custody pursuant to a lawful arrest. *See, e.g.*, *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (fingernail scrapings); *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) (fingerprints); *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967) (handwriting); *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (line-up); *Gustafson v. Florida*, 414 U.S. 260, 94 S. Ct. 488, 38 L. Ed. 2d 456 (1973) (clothing and body surfaces); and *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (blood samples; exigent circumstances may excuse court order).

In order to assure the admissibility of the products of these procedures, some law enforcement officials have undertaken to obtain search warrants for these products. Doubts about the applicability of search warrant procedures have led to puzzling questions and generated a need for greater procedural clarity.

The new procedure has three advantages. First, it puts identification procedures on an independent judicial basis, free from questions about the legality of the initial arrest. Indeed, the procedure may be employed whether the prosecution was initiated by arrest or by summons or the defendant has been released on bail. A judicial identification order based on reasonable grounds is valid under the Fourth Amendment. *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973); *United States v. Mara*, 410 U.S. 19, 93 S. Ct.

774, 35 L. Ed. 2d 99 (1973); and *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969). Second, it replaces the search warrant procedure for defendants with a clear and apposite procedure. Third, it equalizes treatment of bailed and jailed defendants.

Subdivision (a) is modeled on the following provisions: Vermont Rule of Criminal Procedure 16.1(a); Sections 3.1 of the *ABA Standards Relating to Discovery and Procedure Before Trial*; Rule 434 of the *Uniform Rules of Criminal Procedure*; and Article 170 of the *Model Code of Pre-Arraignment Procedure*.

Nothing in subdivision (a) affects identification procedures for suspects who are not defendants.

A district judge should assure that the probable cause requirement of *Gerstein v. Pugh*, 420 U.S. 103 (1975), has been complied with before issuing an identification order.

Subdivision (b) is derived from former Rule 16(b), with two important additions. First, the defendant must state in his notice of alibi the names and addresses of the witnesses upon whom he intends to rely to establish the alibi. Second, the attorney for the state must then reciprocate with the names and addresses of the witnesses who will testify as to the defendant's presence. These additions make the notice of alibi proceeding a more useful tool in the search for truth. They are both derived from F.R.Cr.P. 12.1, effective December 1, 1975.

Subdivision (c) is derived from Vermont Rule of Criminal Procedure 16.1(b).

Subdivision (d) is derived from Uniform Rule 423(b), with the difference that it conditions disclosure upon court order and not simply upon the attorney for the state's request.

Advisory Committee Note—1983

[M.R. Crim. P. 16A(e).] The amendment is designed to ensure timely disclosure to the State of the location of the defense trial experts expected to be called in the defense's case-in-chief.

Advisory Committee Note—1986

[M.R. Crim. P. 16A(c) and (d).] See Advisory Committee Note to amendment to Rule 16(b)(2)(C).

[M.R. Crim. P. 16(b)(2)(C).] The amendment expands the scope of discovery to include pretrial proceedings, such as motions to suppress.

[M.R. Crim. P. 16A(e).] See Advisory Committee Notes to amendments to Rules 16(b)(2)(C) and 16(c)(4).

[M.R. Crim. P. 16(b)(2)(C).] The amendment expands the scope of discovery to include pretrial proceedings, such as motions to suppress.

[M.R. Crim. P. 16(c)(4).] Rule 16(c)(4) is amended to remedy the situation where an expert witness does not provide a written report and discovery under Rule 16(b) is thereby frustrated.]

Advisory Committee Note—1991

[M.R. Crim. P. 16A.] The proposed amendment eliminates the necessity of a motion when the attorney for the state seeks discovery from the defendant of documents, tangible objects, experts' names or experts' reports. These items are made discoverable upon request, placing them in the same category as those items discoverable by the defendant. As with the proposed amendment to Rule 16, the burden of filing a motion is reversed; the party resisting discovery must file a motion for protective order. One last aspect of making the rules symmetrical is to add a subdivision on sanctions modeled after Rule 16(d).

Advisory Committee Note—1995

[M.R. Crim. P. 16A.] Requiring a defendant to provide notice of an intention to introduce expert testimony as to the defendant's mental state is designed to prevent unfair surprise at trial. The requirement is modeled on Federal Rule 12.2, which was promulgated twenty years ago. The rationale of the Federal Rule is:

> The objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony. Failure to give advance notice

commonly results in the necessity for a continuance in the middle of a trial, thus unnecessarily delaying the administration of justice.

If defense counsel is unsure whether to introduce such expert testimony, defense counsel should ask the court to set a later deadline, as proposed in the first sentence. If defense counsel decides to introduce such expert testimony after the deadline has passed, the court may allow a late filing for cause shown (third sentence). "Cause shown" should be liberally construed to effectuate the purpose of the amendment, which is to prevent surprise by a defense counsel who has a preexisting intention to introduce such expert testimony.

Advisory Note – November 2011

The amendment to subparagraph (A)(vii), in combination with current subparagraph (A)(vi), are intended to mirror the category of "biological materials" described in new subdivision (k)(4) of Criminal Rule 41. See also Advisory Note – November 2011 to M.R. Crim. P. 41(k).

RULE 17. SUBPOENA FOR ATTENDANCE OF WITNESSES

(a) For Attendance of Witnesses; Form; Issuance. A subpoena may be issued by the clerk under the seal of the court or by a member of the Maine Bar. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the place and during the time period specified therein. The time period shall not exceed the period covered by the trial list scheduling the case. The attorney for the subpoenaing party shall make arrangements to minimize the burden on the subpoenaed person. Upon the request of a member of the Maine Bar, the clerk shall provide a subpoena, signed and sealed but otherwise in blank. The bar member shall fill in the blanks before it is served. Although a person representing themselves may not be provided a subpoena in blank, that person has the right to secure the issuance of a subpoena by the clerk for obtaining favorable witnesses whose testimony is relevant and material.

(b) Indigent Defendants. A defendant determined indigent by the court pursuant to Rule 44(b) is entitled to subpoena an in-state witness without payment of the witness fee, mileage and cost of service of the subpoena. Such fees and costs shall be paid by the Maine Commission on Indigent Legal Services. A

request to the sheriff for service shall be accompanied by a certificate of counsel that the defendant has been determined indigent.

A defendant who is financially unable to pay the fees and costs to subpoena an out-of-state witness may move ex parte for an order dispensing with payment of fees and costs. The court shall grant the motion if it finds the defendant is unable to pay the fees and costs and that the presence of the witness is necessary to an adequate defense.

(c) For Production of Documentary Evidence and of Tangible Objects. A subpoena may also command the person to whom it is directed to produce at a reasonable time and place specified therein the books, papers, documents, or other tangible objects designated therein. Notice of the service of the subpoena and a copy of it shall be provided to opposing counsel or, when applicable, a pro se defendant, contemporaneously with service. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable, oppressive, or in violation of constitutional rights.

(d) Privileged or Protected Documentary Evidence. If a party or its attorney knows that a subpoena seeks the production of documentary evidence that may be protected from disclosure by a privilege, confidentiality protection or privacy protection under federal law, Maine law or the Maine Rules of Evidence, the party or its attorney shall file a motion in limine, pursuant to Rule 12, prior to serving the subpoena. The motion shall contain a statement of the basis for seeking production of the documentary evidence that may be privileged or protected and shall be accompanied by a copy of the yet unserved subpoena.

Upon receipt of the motion, the clerk shall set the matter for hearing and issue a notice of hearing. The notice shall state the date and time of the hearing and direct the party from whom the documentary evidence is sought to submit the documentary evidence subject to the subpoena for *in camera* review by the court or to adequately explain in writing any reasons for a failure to submit the documentary evidence for *in camera* review. Following the clerk's issuance of a notice, the party seeking production shall serve the subpoena, the motion, and the notice on the party from whom the documentary evidence is sought in accordance with subdivision (e).

Upon receipt of the subpoena, the motion and the notice, the party to whom the subpoena is directed shall either submit the documentary evidence subject to the subpoena for *in camera* review by the court or provide in writing reasons for

the failure to submit the documentary evidence for *in camera* review before the date of the hearing. After the hearing, the court may issue any order necessary to protect any party's privileges, confidentiality protections or privacy protections under federal law, Maine law or the Maine Rules of Evidence. A party that may assert a privilege, confidentiality protection or privacy protection may waive the right to a hearing and any applicable privileges or protections by notifying the court in writing that the party is waiving any applicable privileges or protections.

(e) Service. A subpoena may be served by the sheriff, by the sheriff's deputy, by a constable or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and, except in the case of a person subpoenaed on behalf of the state or a person subpoenaed on behalf of an indigent defendant pursuant to subdivision (b), by tendering to the person the fee for one day's attendance and mileage allowed by law.

(f) Place of Service.

(1) *In State.* A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Maine.

(2) *Out of State.* A subpoena directed to a witness outside the State of Maine shall issue under the circumstances and in the manner and be served as provided in the "Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings."

(g) For Taking Deposition; Place of Examination.

(1) *Issuance.* An order to take a deposition authorizes the issuance by the clerk of the court of subpoenas for the persons named or described therein.

(2) *Place.* A resident of this state shall not be required to travel to attend an examination outside the county where the resident resides, or is employed, or transacts business in person, or a distance of more than 50 miles one way, whichever is greater, unless the court otherwise orders. A nonresident of the state may be required to attend only in the county wherein the nonresident is served with a subpoena, or within 50 miles from the place of service, or at such other convenient place as is fixed by order of court.

(h) Enforcement of Subpoena. If a person fails to obey a subpoena served upon that person, the court may issue a warrant or order of arrest.

Advisory Committee Notes – 1979

[M.R. Crim. P. 17(b).] Rule 17(b) is amended to incorporate the presumption that defendants determined indigent for purposes of assignment of counsel cannot afford to subpoena witnesses. While exceptions to the rule will exist, the cost of weeding them out is too great. The savings in time and effort of court and counsel in the vast majority of cases where the defendant cannot afford to subpoena an in-state witness outweigh the savings realizable in the exceptional cases.

Advisory Committee Notes – 1983

[M.R. Crim. P. 17(a).] The amendment is designed to emphasize that a subpoena need not be limited to a specific day but may specify a reasonable time period.

Advisory Committee Notes – 1987

[M.R. Crim. P. 17(a).] This amendment substitutes members of the Maine Bar for justices of the peace as officers authorized to issue subpoenas. The legislature is phasing out the office of justice of the peace and replacing it with the office of notary public. 5 M.R.S. § 82 (Supp. 1985-1986); *State v. Ellis*, 502 A.2d 1037, 1038 (Me. 1985). The Advisory Committee believed it desirable to restrict the issuance of subpoenas to members of the Bar, who are vested with the powers of a notary public. A parallel amendment is being made to M.R. Civ. P. 45(a).

Advisory Committee Notes – 1988

[M.R. Crim. P. 17(a).] The amendment attempts to balance burdens of inconvenience. The present three-day limit on the life of a subpoena requires the attorney for the subpoenaing party to re-subpoena the witness for the life of the trial list until the case is called. On the other hand, the witness ordinarily should not have to come to the courthouse until the case is called. The amendment makes the subpoena effective for the life of the trial list, but requires the attorney for the subpoenaing party to minimize the courthouse waiting time of the subpoenaed witness.

Advisory Committee Notes – 2000

[M.R. Crim. P. 17(a).] This amendment clarifies the role of the clerk in the subpoena process for attendance of witnesses. First, the amendment replaces the word "shall" with the word "may" in the first sentence since the purpose of that sentence is to recognize the statutory authority of the clerks of the several courts and Maine Bar members (by virtue of possessing the power of notaries public) to issue subpoenas. *See* 16 M.R.S. § 101 (1983) and 4 M.R.S. § 1056 (1989). Notaries public remain omitted because it is not contemplated that they will issue subpoenas for witnesses in criminal proceedings. Second, the amendment seeks to improve upon the explanation in the current final sentence in subdivision (a) as to the duty of a clerk to provide, upon request, blank subpoenas to Maine Bar members representing clients. Third, and finally, the amendment addresses the *pro se* defendant's right to exercise compulsory process. It identifies that person's right under the federal and Maine constitutions to secure the process and testimony of any witness whose testimony will be *relevant, material and favorable to the defendant. United States v. Valenzela-Bernal*, 458 U.S. 858, 867 (1982); *See also State v. Willoughby*, 507 A.2d 1060, 1068 (Me. 1986). Currently Rule 17 does not require judicial oversight for in-state subpoenas for *pro se* defendants and unlike the quashing of subpoenas duces tecum, no process is provided in the Rule allowing for the quashing of subpoenas ad testificandum. Further, the Law Court has held it improper for a court, at least in the context of a motion based upon the anticipated inadmissibility of the potential witness's testimony, to entertain a motion to quash a subpoena ad testificandum. *State v. Willoughby*, *Id*. at 1067, n.6. Left open by the Law Court is the propriety of a court entertaining such a motion on some other ground, such as "where [a] requested subpoena would constitute an oppressive and unreasonable use of the process by the court." *Id*. *See also*, 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 17.7 at IV-127 (rev. ed. 1995). Thus, under current Rule 17 it is essentially left to the individual defendant to ensure that the testimony of any witness subpoenaed be relevant, material and favorable. Of course, the person representing themselves must fully cooperate with the clerk to ensure that the subpoena is properly filled out and nothing prohibits a clerk from consulting with a presiding judge or justice prior to issuing a subpoena.

Advisory Committee Notes – 2001

[M.R. Crim. P. 17(g).] This amendment specifically provides for a warrant or order of arrest to enforce a subpoena; it leaves the subject of contempt for failure to obey a subpoena to Rule 42.

Advisory Committee Note – June 2005

[M.R. Crim. P. 17(d), (e), (f), (g) and (h).] In addition to making certain formalistic changes, including redesignating current subdivisions (d), (e), (f) and (g), subdivisions (e), (f), (g) and (h) respectively, this amendment clarifies the procedures that parties and their attorneys must follow when serving a subpoena that may seek the production of documentary evidence protected from disclosure by a privilege, confidentiality protection or privacy under federal law, Maine law or the Maine Rules of Evidence. The amendment recognizes that the vast majority of subpoenas for documentary evidence are directed to non-party witnesses who are not represented by counsel.

New subdivision (d) provides a specific procedure that allows parties and their attorneys to serve subpoenas seeking documentary evidence potentially protected by a legally cognizable privilege or protection by establishing a mechanism by which the court may expeditiously review and approve the production of such evidence. Nothing in this new subdivision should be construed to preclude a court from ordering disclosure of materials upon a requisite finding.

New subdivision (d) is not intended to allow a court to quash the production of documentary evidence on the ground that those materials may not be admissible at trial. *See State v. Willoughby*, 507 A.2d 1060, 1067 n.6 (Me. 1986). The subdivision neither expands the rights and privileges of subpoenaed parties nor imposes new ethical requirements on attorneys. Finally, the new subsection does not expand or alter any privileges, confidentiality protections or privacy protections under federal law, Maine law or the Maine Rules of Evidence.

Advisory Note – June 2006

M.R. Crim. P. 17(g)(2). The amendment replaces the spelled-out number "fifty" with its figure counterpart. *See* Advisory Note to M.R. Crim. P. 6(a) and (b)(2).

Advisory Note – July 2010

M.R. Crim. P. 17(b). *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

Advisory Note – October 2013

Rule 17 is amended to resolve three problems that had developed in its operation. The first problem was uncertainty about where and when subpoenaed documents or other tangible objects pursuant to subdivision (c) were to be produced by a subpoenaed witness who is commanded to testify at a trial or hearing. Rule 17(c) formerly provided that the court "may direct" that the subpoenaed documents or other tangible objects "be provided before the court at a time prior to trial." However, in practice this judicial action rarely happened. Instead, the subpoenaing party and the subpoenaed witness negotiated about the time and place of production, with no guidance from the rule. As now amended, subdivision (c) requires that the subpoena direct the subpoenaed person to produce the designated documentary evidence or other tangible objects "at a reasonable time and place specified therein."

The second problem was uncertainty about what notice, if any, was to be provided to an adverse party at the time a subpoena issued. Rule 17(c) formerly provided no guidance. As now amended, subdivision (c) provides that "[n]otice of the service of the subpoena and a copy of it shall be provided to opposing counsel or, when applicable, a pro se defendant, contemporaneously with service."

The third problem was presented when the subpoenaing party was solely interested in obtaining the subpoenaed documents or other tangible objects and had no interest in commanding the attendance of a witness at a trial or hearing. Although that situation was commonplace, it was a situation not contemplated by Rule 17, which only addresses document production in connection with witness attendance. As the amendment to the heading of Rule 17 makes clear, Rule 17 continues to deal exclusively with witness attendance and attendant document or other tangible object production. However, a new Rule 18 has been adopted that deals exclusively with a subpoenaing party whose interest is solely in obtaining documents or other tangible objects by subpoena without witness attendance. See Advisory Note – October 2013 to M.R. Crim. P. 18.

RULE 18. SUBPOENA FOR PRODUCTION OF DOCUMENTARY EVIDENCE OR TANGIBLE OBJECTS BY A NONPARTY

(a) Subpoena to Produce Documentary Evidence or Tangible Objects. A party may serve a subpoena on a nonparty commanding the nonparty to produce documentary evidence or tangible objects at the time and place specified therein. The time specified shall be not less than 14 days, unless a

shorter time is ordered by the court. The place specified shall not impose an undue burden or expense upon the nonparty. Documentary evidence includes, but is not limited to, electronically stored information, books, papers, photographs, and videos. A subpoena may be issued by the clerk under the seal of the court or by a member of the Maine Bar. A pro se defendant may be provided a subpoena completed by the clerk. A member of the Maine Bar may be provided a subpoena in blank. The text of subdivisions (d), (e), and (f) of this rule shall be contained in, or appended to, the subpoena.

(b) Service. A subpoena may be served by the sheriff, by the sheriff's deputy, by a constable, or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named. A defendant determined indigent by the court pursuant to Rule 44(b) is entitled to service within the State without payment of the cost. Such cost shall be paid by the Maine Commission on Indigent Legal Services. A request to the sheriff for service shall be accompanied by a certificate of counsel that the defendant has been determined indigent.

(c) Notice to Adverse Party. Unless otherwise provided by statute, notice of the service of the subpoena and a copy thereof shall be provided to opposing counsel or, when applicable, a pro se defendant contemporaneously with service.

(d) Motion to Quash or Modify Subpoena. A party or the subpoenaed nonparty or a person whose rights are potentially affected by the subpoena may move to quash or modify the subpoena.

The court may quash or modify the subpoena if compliance would be unreasonable, oppressive, or in violation of constitutional rights.

(e) Sanction for Noncompliance. If the subpoenaed person fails to obey the subpoena, the court shall order an appropriate sanction, which may include a warrant or order of arrest.

(f) Privileged or Protected Documentary Evidence. If a party or the party's attorney knows that a subpoena seeks the production of documentary evidence that may be protected from disclosure by a privilege, confidentiality protection, or privacy protection under federal law, Maine law, or the Maine Rules of Evidence, the party or the party's attorney shall file a motion in limine, pursuant to Rule 12, prior to serving the subpoena. The motion shall contain a statement of

the basis for seeking production of the documentary evidence that may be privileged or protected and shall be accompanied by a copy of the yet unserved subpoena.

Upon receipt of the motion, the clerk shall set the matter for hearing and issue a notice of hearing. The notice shall state the date and time of the hearing and direct the party from whom the documentary evidence is sought to submit the documentary evidence subject to the subpoena for *in camera* review by the court or to adequately explain in writing any reasons for a failure to submit the documentary evidence for *in camera* review. Following the clerk's issuance of a notice, the party seeking production shall serve the subpoena, the motion, and the notice on the party from whom the documentary evidence is sought in accordance with this rule.

Upon receipt of the subpoena, the motion, and the notice, the party to whom the subpoena is directed shall either submit the documentary evidence subject to the subpoena for *in camera* review by the court or provide in writing reasons for the failure to submit the documentary evidence for *in camera* review before the date of the hearing. After the hearing, the court may issue any order necessary to protect any party's privileges, confidentiality protections, or privacy protections under federal law, Maine law, or the Maine Rules of Evidence. A party that may assert a privilege, confidentiality protection, or privacy protection may waive the right to a hearing and any applicable privileges or protections by notifying the court in writing that the party is waiving any applicable privileges or protections.

Advisory Note – October 2013

Rule 18 is adopted to deal with a subpoena for production of documentary evidence or other tangible objects by a nonparty without witness attendance. It draws on features of Rule 17 and Civil Rule 45. Rule 17 continues to deal exclusively with a subpoena for witness attendance and attendant document or other tangible object production. See Advisory Note – October 2013 to M.R. Crim. P. 17(c). New Rule 18 provides for the standard features of the contents of subpoena, its service, notice to adverse party, motions therein, sanctions, and the special provisions for privileged or protected documentary evidence reproduced from Rule 17(d). Rule 18(c) also provides for notice of service of the subpoena and a copy thereof to the adverse party "[u]nless otherwise provided by statute." The exception recognizes special circumstances such as that reflected in 9-B M.R.S. § 163 relative to customer's bank records. It is anticipated that subdivision

(d) of Rule 18 will be applied in accordance with the four factors approvingly listed in *State v. Watson,* 1999 ME 41, ¶ 6, 726 A.2d 214.

RULES 19 TO 20. [RESERVED]

V. TRIAL

RULE 21. PLACE OF TRIAL

(a) Venue.

(1) *In the Superior Court.* The trial shall be in the county in which the crime was committed, except as otherwise provided by law.

(2) *In the District Court.* The trial shall be in the division in which the crime was committed, except as otherwise provided by law, but if the proceeding involves two or more crimes committed in different divisions, it may be brought in any one of them.

(b) Change of Venue.

(1) *Upon Motion.* The court upon motion of the defendant shall transfer the proceeding as to the defendant to another county or division if the court is satisfied that there exists in the county or division where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial in that county or division. The motion may be made only before the jury is impaneled or, where trial is by the court, before any evidence is received.

(2) *By Consent.* With the consent of the defendant and the attorney for the state the court may transfer a proceeding to another county or division.

(3) *Without Consent.*

(A) In the Superior Court. Upon the court's own motion, the court may, for purposes of sound judicial administration, transfer any proceeding to a location that is both in an adjoining county and in the vicinity of where the crime was committed.

(B) In the District Court. Upon the court's own motion, the court may transfer a case to another division for hearing for the purposes of sound judicial administration. Any judgment or sentence rendered in such a transferred case shall be deemed to be the judgment and sentence of the transferring division.

(4) *Crime Committed in Two or More Counties.* The court upon motion of the defendant shall transfer the proceeding as to the defendant to another county if it appears from the indictment or information or from a bill of particulars that the crime was committed in more than one county and if the court is satisfied that in the interest of justice the proceedings should be transferred to another county in which the commission of the crime is charged. When two or more crimes are charged against the defendant, the court may upon motion of the defendant and in the interest of justice transfer all or part of the counts if any one of the counts which is transferred charges a crime committed in the county to which the transfer is ordered.

(5) *Proceedings on Change of Venue.* If the defendant is in custody, when a change of venue is ordered, the defendant shall be delivered to the custody of the sheriff of the county to which the proceeding is transferred at an appropriate time as indicated by the justice or judge. The clerk shall transmit to the clerk of the court to which a proceeding is transferred all papers in the proceeding or certified copies thereof and any bail taken and the prosecution shall continue in that county or division.

Supreme Judicial Court Note—1984

[M.R. Crim. P. 21(b).] Rule 21(b) is amended to eliminate the limitation on transfer of venue to a county within the same judicial region. This amendment reflects the elimination of the regional presiding justices brought about coincident with the creation of the office of Chief Justice of the Superior Court. *See* 1983 Laws c.269, §§ 5,7, amending 4 M.R.S. 19 and enacting 4 M.R.S. § 101A.

Advisory Committee Note—1986

[M.R. Crim. P. 21.] An amendment to Rule 21 is needed to carry into effect the amendments made to 15 M.R.S. § 1 by P.L. 1985, ch. 479.

Advisory Committee Note—1989

[M.R. Crim. P. 21.] Rule 21 consolidates the provisions relating to venue. It now includes the language of former Rule 18 specifying the place of trial, the language of former Rule 21 on change of venue, and the language of former Rule 22 on the timing of a motion to change venue.

Advisory Committee Note—1990

[M.R. Crim. P. 21(b)(5).] Rule 21 is amended to eliminate the requirement that an order changing venue direct that a defendant be delivered "forthwith" to the custody of the sheriff of the county to which the proceedings have been transferred. The convenience of the parties or security considerations, for example, may make it appropriate to transfer custody of a defendant at a later time. The rule now leaves this question of the timing of the transfer to the discretion of the justice or judge hearing the motion.

Advisory Note - June 2006

M.R. Crim. P. 21(b)(3)(A). The amendment replaces the term "offense" with the term "crime." This reference to "offense" was overlooked when similar references throughout Rule 21, including subdivision (b), were replaced with "crime" effective January 1, 2004. *See* Me. Rptr., 832-845 A.2d XLIX, LVIII.

RULE 22. TRANSFER FOR JURY TRIAL ON A CHARGE OF A CLASS D OR CLASS E CRIME

(a) Demand. In all prosecutions in the District Court the defendant may demand a trial by jury. Unless a demand for trial by jury is made not later than 21 days after arraignment, the defendant shall be deemed to have waived the right to trial by jury. In cases where a plea is entered in writing pursuant to Rule 10, the 21-day period commences to run on the date originally scheduled for arraignment.

(b) Transfer. Upon timely demand for jury trial, the District Court shall transmit to the appropriate Superior Court the District Court's entire original file in the case, any bail that has been taken and a copy of all the docket entries. Bail shall continue until further order of the Superior Court.

(c) Pretrial Motions. All timely pretrial motions not yet heard in the District Court at the time of the timely demand for jury trial shall be heard and decided in the Superior Court following the transfer, provided, however, that any

motion for bail of an incarcerated defendant pending when the demand for jury trial is filed, or filed with the demand for jury trial, shall be heard and decided by the District Court at the next available court date. Any pretrial motion subsequently filed in the Superior Court that is not timely filed under Rule 12 is waived by the defendant, except that a later motion may be filed and considered when the defendant was not aware of the grounds for the motion within the time for filing such a motion.

Any pretrial motion heard and decided in the District Court prior to the time of a timely demand for jury trial shall be treated as a pretrial ruling of the Superior Court.

Advisory Committee Note – 1989

Former Rule 22 has been transferred to Rule 21. New Rule 22 incorporates the language of former District Court Rules 40 and 41(b). It also eliminates an ambiguity by making clear in the contemporaneous amendment of Rule 41(e) that certain motions for return of illegally seized property may be brought in District Court.

[The Maine District Court Criminal Rules were abrogated and incorporated into the Maine Rules of Criminal Procedure, effective June 1, 1989. Because M.R. Crim. P. incorporates former M.D.C. Crim. R. 40 and 41, the advisory committee notes to those abrogated rules are included below.]

Advisory Committee Note—1975

[M.D.C. Crim. R. 40.] This amendment implements Maine Laws, 1975, chapter 139. It changes the prior procedure in transfer cases by requiring arraignment and plea in the District Court and the raising in the District Court of any defenses or objections which must be raised under Rule 12. Thus, as on appeal, the only action left to be taken in the Superior Court is the trial, either before the court or before a jury. In order to eliminate a transfer inconveniencing the attorney for the state and witnesses for the state the rule provides that the request for transfer must be made at least three days prior to trial in the District Court or else the right to transfer will be deemed to have been waived.

Advisory Committee Note—1982

Notes of the Single Trial Committee and the

Advisory Committee on Criminal Rules

[M.D.C. Crim. R. 40.] On June 23, 1981, the Maine Legislature enacted c. 487, which repealed and replaced 15 M.R.S. § 2114 so as to read:

> § 2114. Defendant shall make election of jury trial. In all Class D and E criminal proceedings, the defendant may waive his right to jury trial and elect to be tried in the District Court, as provided by rule of the Supreme Judicial Court. An appeal to the Superior Court following trial and conviction in the District Court shall be only on questions of law.

Shortly thereafter, the Chief Justice established a special committee of judges to formulate proposed rules for implementing the legislation. This committee, composed of Judges from the District Court, Superior Court and Supreme Judicial Court, became known as the Single Trial Committee.

The central task of the Committee was to formulate a fair and workable procedure whereby the defendant might "waive" his right to jury trial and "elect" to be tried in the District Court.

Three general approaches were possible. First, the defendant might waive his constitutional right by affirmative action. See, e.g., Criminal Rule 23(a). Second, the defendant might be required simply to elect whether to be tried in the District Court or the Superior Court. Third, the defendant might be deemed to waive his constitutional right by inaction.

The Single Trial Committee chose the third approach. The heart of its proposal is contained in amendments to District Court Rules 5(b) and 40(a). Proposed District Court Rule 40(a) provides in relevant part:

> Unless a demand for trial by jury is made not later than 21 days after arraignment, the defendant shall be deemed to have waived his right to trial by jury.

Proposed District Court Rule 5(b) provides in relevant part:

> The defendant shall be advised of his right to trial by jury and of the necessity of a demand for jury trial in accordance with these rules.

The Advisory Committee on Criminal Rules preferred the second approach, viz., that of a mandatory election of forum. The Advisory Committee believed it insupportable that a right secured by the state and federal constitutions should be lost by uncounseled inaction. The Advisory Committee believed that if the "waiver by inaction" approach were followed, then further procedures would be necessary to assure the adequacy of the advice given the defendant under District Court Rule 5(b).

Both Committees are in agreement that, if proposed District Court Rule 5(b) is adopted, that the defendant must be given the following kinds of advice:

1) Advice which is adequate to enable the defendant to make a "free and intelligent choice";[1] and

2) Advice about how to make a "demand."

The Advisory Committee suggests that the defendant be given a paper at arraignment which:

1) Gives the defendant adequate advice about his choice; and

2) Provides the defendant with a form for exercising that choice and instructions on how to fill out and turn in the form.

The Advisory Committee suggests that the Court take whatever action it believes appropriate to assure that this is done, including a further amendment to District Court Rule 5(b), an administrative order or action in conjunction with the Chief Judge of the District Court.

Motions

Another important decision reached by the Single Trial Committee is that all pretrial motions in cases transferred for trial in the Superior Court shall be made, heard and determined in tile District Court.

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[1] The quoted language is the federal constitutional test of waiver of the jury trial right. Adams v. United States ex rel. v. McCann, 317 U.S. 269, 275 (1942). A defendant charged with a Class D crime has a federal constitutional right to jury trial. Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974).

This decision is implemented in amendments to District Court Rules 12(b), 40(a) and 41.

The defendant is given until 21 days after arraignment to file any pretrial motions. District Court Rule 12(b)(3). A parallel amendment is made to Criminal Rule 12(b)(3). The purposes of both amendments are to standardize the practice regarding filing of motions, to avoid the practice of filing motions close to the trial date as an excuse to delay trial and to end the uncertainty regarding which motions must be filed before arraignment.

Once all the motions are determined, or the time for making motions has passed, the District Court will enter an order of transfer.

Effective Date

Any arraignment conducted after January 2, 1982 is to be conducted according to amended District Court Rule 5(b). If the arraignment was conducted prior to January 2, 1982, then the District Court must either rearraign the defendant or allow the defendant to exercise his options under the prior law, i.e., to transfer or to appeal for a trial de novo, unless the defendant has waived rearraignment.

Advisory Committee Note—1971

[M.D.C. Crim. R. 41(b).] There seems to be a great deal of confusion concerning the appropriate procedure for dealing with illegally secured evidence in misdemeanor proceedings pending in the District Court. The rules as originally drafted provided for no motion to suppress evidence in misdemeanor proceedings pending in the District Court. The theory behind this omission was that counsel, at the time of trial before the District Judge, could object to the admissibility of such evidence and without the necessity of discharging a jury have a full hearing as to the legality or illegality of the seizure. On the other hand, if there is a felony proceeding pending in the District Court, the defendant may immediately move in the Superior Court to suppress any illegally procured evidence. Apparently, District Court judges and Superior Court judges have been dealing with misdemeanor proceedings in somewhat different ways. Some District Court judges will not at trial consider an objection made on the ground that evidence is illegally secured but insist that counsel file a motion to suppress that evidence in Superior Court. Yet, some Superior Court judges will refuse to hear motions to suppress evidence in a misdemeanor proceeding which is pending in the District Court, relying upon what is the obvious intent of the rules that these matters be resolved

by the District Court judge in passing upon the admissibility of the evidence. Other Superior Court judges will entertain such motions.

Because of this confusion District Court Criminal Rule 41 is amended to provide that upon consent of all parties and the judge, prior to trial, a motion to suppress evidence may be heard in District Court in misdemeanor proceedings pending in that court. While it is the Committee's belief that this procedure will not be used nor need be used with any great frequency, on those occasions in which it might serve to expedite the disposition of a matter pending in the District Court there seems no reason to prohibit the court from determining the question of the admissibility of certain evidence prior to trial.

Advisory Committee Note—1978

[M.D.C. Crim. R. 41(a) and (b).] This amendment to District Court Rule 41 accommodates the new Criminal Code, 17-A M.R.S., effective May 1, 1976.

Advisory Committee Note—1982

[M.D.C. Crim. R. 41.] [See Note to the January 2, 1982 Amendment to District Court Criminal Rule 40].

Advisory Committee Note—1993

[M.R. Crim. P. 22(c).] The Chief Judge of the District Court has pointed out to the Committee that the requirement of a transfer order constitutes a cumbersome formality which results in unnecessary delay. The purpose of the amendment is to eliminate the requirement of a transfer order and to authorize the clerk to automatically transmit the file when the case is in order for transfer.

Advisory Committee Notes—1999

[M.R. Crim. P. 22(a).] This amendment eliminates current uncertainty as to when the 21-day period for filing a jury trial request commences in the event a plea of not guilty is entered in writing pursuant to Rule 10. In practice, some District Courts treat the 21-day period as beginning to run on the date the written plea is filed. Other District Courts treat the date originally set for arraignment as the commencement date. The latter approach is adopted both for purposes of clarity and in recognition of the fact that the scheduled arraignment date is generally the point in time when the attorney for the state is adequately prepared to provide

information vital to the defendant's decision to file a jury trial request by way of discovery.

Advisory Committee Notes—2001

[M.R. Crim. P. 22(c).] This amendment corrects a typographical error and adds "a copy of all the docket entries" to those items required to be transmitted to the Superior Court by the clerk of the District Court.

Advisory Notes—2002

Subdivisions (b) and (c) of Rule 22 are modified to eliminate the current requirement that prior to a case involving a Class D or Class E crime being in order for transfer to the Superior Court following a timely demand for jury trial the District Court "shall proceed to hear all pretrial matters . . . ." Instead of requiring the District Court to essentially carry the entire burden of hearing and deciding pretrial motions in these cases, Rule 22 now provides that once a timely demand for jury trial is made the case will be in order for immediate transfer to the Superior Court and all timely filed pretrial motions, except motions for bail of an incarcerated defendant, not yet heard in the District Court will be heard and decided in the Superior Court following the transfer.

These changes to Rule 22 do not alter the time within which pretrial motions must be filed in a case involving a Class D or Class E crime under Rule 12(b)(3).

RULE 23. TRIAL BY JURY OR BY THE COURT

(a) Trial by Jury; Waiver. The defendant with the approval of the court may waive a jury trial. In any case in which the crime charged is murder, or a Class A, Class B, or Class C crime, the waiver shall be in writing and signed by the defendant; but the absence of a writing in such a case shall not be conclusive evidence of an invalid waiver.

(b) Jury of Fewer Than 12. Juries shall be of 12, but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number fewer than 12.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request stated on the record after

the court announces its verdict, find the facts specially on the record or in a written decision. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein. When the court has not announced its verdict on the record and subsequently files an opinion or memorandum of decision, any motion for findings or for additional or amended findings shall be filed within seven days of the filing of the opinion or memorandum of decision. The court may deny a motion for findings filed out of time.

Advisory Committee Note—1980

[M.R. Crim. P. 23(a).] The principal purpose of the amendment is to dispense with the requirement of a written waiver of jury trial when the offense charged is a Class D or Class E crime.

Advisory Committee Note—1989

[M.R. Crim. P. 23(c).] Rule 23(c) is amended to make clear that it applies only to cases tried without a jury in the Superior Court.

Advisory Note – June 2006

M.R. Crim. P. 23(b). The amendment replaces in the text spelled-out number "twelve" with its figure counterpart. *See* Advisory Note to M.R. Crim. P. 6(a) and (b)(2).

Advisory Note—July 2010

The amendment to M.R. Crim. P. 23(b) and (c) modifies both the heading and substance of subdivision (b) of Rule 23 by replacing the word "less" with the word "fewer." Further, the amendment modifies subdivision (c) in two respects, reflective of current practice. First, it removes from both the heading and the substance of subdivision (c) the references to the "Superior Court," thus broadening the rule to allow parties to request findings after announcement of a general verdict in non-jury trials in either the Superior Court or the District Court. Second, it requires that the party requesting further findings do so at the time the verdict is announced at the conclusion of the trial. The large volume of non-jury criminal trials makes delayed requests for findings impractical because of the risk of confusing different cases with similar issues.

When the court takes a matter under advisement to announce a verdict at a later time by written decision, if the written decision does not include findings, any request for findings must be filed within seven days after filing of the written decision. The court may deny motions for findings filed out of time, or it may, in its discretion, act on the motion and issue further or amended findings.

RULE 24. TRIAL JURORS

(a) Examination of Jurors. The parties or their attorneys may conduct the examination of the prospective jurors unless the court elects to conduct an initial examination itself. If the court elects to conduct an initial examination, when that examination is completed the court shall permit the parties or their attorneys to address additional questions to the prospective jurors on any subject which has not been fully covered in the court's examination and which is germane to the jurors' qualifications.

(b) Challenges for Cause. Challenges for cause of individual prospective jurors shall be made at the bench, at the conclusion of the examination.

(c) Peremptory Challenges.

(1) *Manner of Exercise.* Peremptory challenges shall be exercised by striking out the name of the juror challenged on a list of the drawn prospective jurors prepared by the clerk. The court may permit counsel to exercise a peremptory challenge of a juror immediately following the examination of that juror.

(2) *Order of Exercise.* Peremptory challenges shall be exercised one by one, alternately, with the state exercising the first challenge. If there are two or more defendants, the court may allow additional peremptory challenges as specified in paragraph (3), the court may permit the additional challenges to be exercised separately or jointly, and determine the order of the challenges.

(3) *Number.* If the crime charged is punishable by life imprisonment, each side is entitled to 10 peremptory challenges. If the crime charged is a Class A crime not punishable by life imprisonment, a Class B crime, or a Class C crime, each side is entitled to 8 peremptory challenges. In all other criminal prosecutions each side is entitled to 4 peremptory challenges. If there are two or more defendants, the court may allow each side additional peremptory challenges.

(d) Alternate Jurors. The court may direct that not more than 4 jurors in addition to the regular panel be called and impaneled to sit as alternate jurors as provided by law. The manner and order of exercising peremptory challenges to alternate jurors shall be the same as provided for peremptory challenges of regular jurors. In all criminal prosecutions, each side shall be entitled to one peremptory challenge of the alternate jurors. If there is more than one defendant, the court may allow the defendants additional peremptory challenges, permit the additional challenges to be exercised separately or jointly, and determine the order of the challenges.

(e) Sequestration of the Jury. In all jury trials the jury shall be allowed to separate until it retires to consider its verdict, unless the court finds it necessary to order sequestration of the jury to ensure the fairness of the trial. Upon retiring to consider its verdict, the jury shall be sequestered, but it may be allowed to separate in the discretion of the court.

(f) Note-Taking by Jurors. The court in its discretion may allow jurors to take handwritten notes during the course of the trial. If note-taking is allowed, the court shall instruct the jury on the note-taking procedure and on the appropriate use of the notes. Unless the court determines that special circumstances exist that should preclude it, jurors should be allowed to take their notes into the jury room and use them during deliberations. Counsel may not request or suggest to a jury that jurors take notes or comment upon their note-taking. Upon the completion of jury deliberations, the notes shall be immediately collected and, without inspection, physically destroyed under the court's direction.

Advisory Committee Note—1967

[M.R. Crim. P. 24(c)(1).] The amendment to this rule is designed to deal with a problem which has arisen in cases in which the selection of the jury extended over a period of several days. A single trial juror who has been examined on voir dire and passed for cause may be permitted to remain with other prospective jurors who have been so examined and passed despite the fact that one of the counsel is certain that he will ultimately exercise a peremptory challenge and excuse that juror. Counsel have complained that the sequestering of that juror with other prospective jurors who have been passed for cause may result in contamination of the entire panel. Apparently some Justices have doubted whether they had the power to permit peremptory challenge of a juror immediately following his examination. The amendment removes any doubt.

Advisory Committee Note—1976

[M.R. Crim. P. 24(c)(3).] This amendment accommodates the abolition of the felony misdemeanor distinction in the new Criminal Code, Title 17-A of the Maine Revised Statutes. No change is made in the number of peremptory challenges allowed. 1st and 2nd degree criminal homicide carry the same number of challenges formerly allowed in murder cases. Classes A, B, and C carry the same number as formerly allowed in other felony cases. Classes C and D [sic] carry the same number as formerly allowed in misdemeanors.

Advisory Committee Note—1977

[M.R. Crim. P. 24(c)(3).] This amendment conforms the Rule to the re-introduction in the Criminal Code of the crime of murder, l7-A M.R.S. § 201, in lieu of the crimes of homicide in the first and second degree. P.L. 1977, c.510, § 38, effective October 24, 1977.

Supreme Judicial Court Note—1978

[M.R. Crim. P. 24(e).] Subdivision (e) changes the prior practice, as reaffirmed in State v. Woods, 154 Me. 102, 144 A.2d 259 (1958), requiring sequestration of the jury throughout a trial in which the offense charged is punishable by life imprisonment. The subdivision makes the practice in such a trial the same as in all others: sequestration of the jury throughout the trial is not required. However, the court has discretion, which it may exercise at its commencement or any time in the course of a trial, to require sequestration of the jury to protect the fairness of the trial. The reference to the availability of alternative means makes clear that the court may resort to methods other than sequestering the jury to protect the fairness of the trial, including, for example: before trial, to order a change of venue or a continuance and, at trial, (1) to subject prospective jurors to careful examination to minimize likelihood that the judgment of the jurors chosen will be affected by potential exposure to matters outside the evidence, (2) to instruct parties and witnesses that extra-judicial statements about the case should not be made for public dissemination, (3) to admonish the jurors when sworn, and to repeat the admonition frequently during the trial, that the jurors should avoid reading newspapers, or listening to or watching radio or television accounts of the proceedings in the case, or (4) with the consent of the defendant, to exclude the public from any part of the trial which takes place outside the presence of the jury. This subdivision also continues the practice requiring sequestration of the jury once if has retired to consider its verdict, simultaneously preserving the

practice established by Anonymous, 63 Me. 590 (1875) of permitting the court in special circumstances to authorize the jury to separate after delivery of a sealed verdict. However, the rule of Anonymous is changed in the single particular that the authorization for sealed verdicts is extended to trials in which the offense charged is punishable by life imprisonment. It should be noted that in light of Rule 31(e) the special circumstances warranting resort to a sealed verdict would exist only rarely.

Advisory Committee Note—1984

[M.R. Crim. P. 24(e).] The redrafting of Rule 24(e) creates twin rebuttable presumptions: 1) that a jury should be allowed to separate during trial and 2) that it should be sequestered after retiring to deliberate. Allowing separation during deliberations with the consent of the parties and the approval of the court reflects the fact that not all cases pose a significant danger of improper influence on the jury if it is allowed to separate during deliberations.

Advisory Committee Note—1990

[M.R. Crim. P. 24(e).] Rule 24(e) is amended to remove the requirement that the parties consent to the separation of a jury which has retired to consider its verdict. The question of separation of a jury which has begun deliberations is now left to the discretion of the presiding justice.

Advisory Committee Note—1991

[M.R. Crim. P. 24(c)(2) and (3) and 24(d).] The Advisory Committee sees no reason to continue the practice of giving to a defendant in a murder case twice as many peremptory challenges as are given to the state. This amendment should reduce the jury costs of a murder trial. If there is more than one defendant, the court has discretion to allow additional challenges.

Advisory Committee Note—1996

[M.R. Crim. P. 24(f).] New subdivision (f) is added to address note-taking during the trial by jurors. Heretofore juror note-taking has not been the subject of statute or court rule. Until recently, Maine has followed the common law practice of not allowing jurors to take notes. *State v. Fuller*, 660 A.2d 915, 917 (Me. 1994). However, in *Fuller* the Law Court declined to find juror note-taking an illegal

practice and instead gave tacit approval to allowing it if properly monitored by the trial court and accompanied by adequate instructions. *Id*. at 917, n.1.

New subdivision (f) expressly recognizes the propriety of the practice. It leaves the decision as to whether jurors should be allowed to take notes in a given case solely in the hands of the trial court as an exercise of sound discretion. It is assumed that a court in exercising that discretion will take into consideration the anticipated length and relative complexity of the case. Note-taking by means other than writing, such as the use of an audio recording device or laptop computer, are not permitted under the rule. However, an exception made to reasonably accommodate a disabled juror would be allowed where necessary to comply with controlling federal or state law.

If note-taking is allowed, new subdivision (f) contemplates that the trial court must exercise control and direction over the manner in which jurors take notes over the course of the trial. In this regard, the trial court is expected to supply the materials necessary for jury note-taking, maintain proper control over such materials throughout the trial, and provide by way of preliminary instructions proper guidance to the jurors as to the proper procedure and the appropriate use of the notes.

Barring problems encountered during trial with juror note-taking in a given case, new subdivision (f) anticipates, if note-taking is permitted by the court in the first instance, that the jurors will have the use of their notes during deliberations. This anticipation is based upon the apparent illogic of allowing note-taking during trial but then denying the note-takers the actual use of their notes during deliberations. Before jury deliberations, the rule assumes that the trial court, as part of its final instructions to the jury, will once again give proper guidance as to the use of the notes. As is true with the preliminary instructions, these final instructions on note usage should include the following conditions: First, that the jurors' notes "are merely aids to their memories and should not be given precedence over their independent recollection of the evidence." *Esaw v. Friedman*, 217 Conn. 553, 563, 586 A.2d 1164, 1169 (1991). Second, "that a juror who has not taken notes should rely on his [or her] recollection of the evidence and should not be influenced by the fact that other jurors have done so." *Id*. Third, "that they should not allow their note-taking to distract them from paying proper attention to the evidence presented to them." *Id*. Fourth, and finally, that the jurors "must not disclose the contents of their notes except to their fellow jurors." *Id*. at n.10.

New subdivision (f) seeks to make clear that counsel is prohibited from requesting or suggesting to the jury that written notes be taken or to comment in any way upon the jurors' note-taking. Commenting to the jury respecting note-taking is wholly a matter for the trial court.

New subdivision (f) requires that immediately at the completion of jury deliberations, the written notes will be collected, without inspection, and physically destroyed under the direction of the trial court. Immediate physical destruction reflects the rule's intent that jurors' notes are not to be used to impeach a verdict. Further, to allow preservation of the notes for purposes of a post-verdict motion or appellate review

> . . . would be inconsistent with the purposes of permitting jurors to take notes in the first place. That purpose is to enable any individual juror, if he [or she] sees fit, to make a private, confidential written record of his [or her] thoughts, perceptions and questions so that he [or she] may better be able to recall the evidence and to engage in deliberations at the appropriate time. . . . Requiring that the notes be preserved would create the impermissible risk that jurors who wish to take notes would be inhibited from doing so.

Id. 217 Conn. at 565, 586 A.2d at 1170. Still further, immediate physical destruction rather than preservation is entirely consistent with M.R. Evid. 606(b) that excludes testimony from a juror about his or her own thought processes in arriving at a verdict as well as any statements made in the course of the jury's deliberations.

Finally, barring the need to do so earlier, the Committee intends to review the operation of new subdivision (f) in two years to determine if any revision of it is necessary or desirable.

Advisory Note – June 2006

M.R. Crim. P. 24(d). The amendment replaces the spelled-out number "four" with its figure counterpart. *See* Advisory Note to M.R. Crim. P. 6(a) and (b)(2).

Advisory Notes – March 2010

M.R. Crim. P. 24(c)(2) and (3). The amendment modifies paragraph (2) of subdivision (c) in two respects. In the first sentence the word "alternatively" is replaced by the word "alternately." In the second sentence, that portion addressing the court's authority to allow additional peremptory challenges in the event of multiple defendants has been moved to paragraph (3) as a new final sentence since paragraph (3) addresses the number of peremptory challenges authorized. That portion of the second sentence addressing exercise of additional peremptory challenges provided to multiple defendants is retained in paragraph (2) with new introductory language. As in current practice, when the court exercises its authority to increase the number of peremptory challenges, an equal increase is given to each side. *See,* Alexander, *Maine Jury Instruction Manual,* § 2-13 (4th ed. 2009).

The amendment further modifies paragraph (3) of subsection (c) in two respects. In the first sentence the reference to "murder" is replaced by "punishable by life imprisonment" since the crime of aggravated attempted murder, 17-A M.R.S. § 152-A, added to the Maine Criminal Code by P.L. 2001, ch. 413, § 2, is also potentially punishable by life imprisonment. Historically, entitlement by each side to the maximum number peremptory challenges authorized by Rule 24 for any crime has been predicated upon the crime charged carrying the potential of life imprisonment as a punishment. *See generally,* 1 Cluchey & Seitzinger, *Maine Criminal Practice,* § 24.4, n. 41 at V-57 (Gardner ed. 1995); Me. Rptr. 344-351 A.2d XLIII-XLIV and LIV-LV; and Me. Rptr. 376-380 A.2d XXXII and XXXVIII. The second sentence, in addition to formalistic changes to enhance clarity, adds the limitation "not punishable by life imprisonment" because aggravated attempted murder is a Class A crime. 17-A M.R.S. § 152-A(2).

RULE 25. DISABILITY OF A JUSTICE OR JUDGE

If by reason of death, resignation, removal, sickness or other disability, a justice or judge before whom a defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt any other justice or judge assigned thereto by the Chief Justice of the Superior Court or the Chief Judge of the District Court may perform those duties; but if such other justice or judge is satisfied that he or she cannot perform those duties because the justice or judge did not preside at the trial or for any other reason, the justice or judge may in the exercise of discretion grant a new trial.

Supreme Judicial Court Note—1984

[M.R. Crim. P. 25.] Rule 25 is amended to substitute the Chief Justice of the Superior Court for the Chief Justice of the Supreme Judicial Court as the official to assign a replacement for a disabled justice. The amendment implements the delegation authority contained in 4 M.R.S. § 101A, enacted by 1983 Laws, c. 269, which created the position of Chief Justice of the Superior Court. This and other simultaneous amendments are intended to give the Chief Justice of the Superior Court authority under the Maine Rules of Criminal Procedure parallel to that of the Chief Judge of the District Court under the District Court Criminal Rules. Both officials remain subject to the supervision of the Chief Justice of the Supreme Judicial Court. See 4 M.R.S. §§ 101A, 164.

Advisory Committee Note—1989

[M.R. Crim. P. 25.] The language of Rule 25 is modified slightly to make it clear that it applies to both Superior Court justices and District Court judges.

RULE 25A. SCHEDULING AND CONTINUANCES

(a) Definitions.

(1) "Continuance Order" is defined as an order entered by a judge that effectively removes a case from a trial list or date certain court event in response to a written motion. Absent the entry of a continuance order, a case is subject to being called for trial throughout the trial list period or for a court event on the designated date certain.

(2) "Effectively removes a case from a trial list" includes the unavailability for essential dates or when the number of days necessary for trial of the case, based on the parties' good faith estimate of the time for trial, is more than the difference between (i) the number of days remaining on a trial list at the time a motion for a continuance or a request for protection is made, and (ii) the number of days sought in the motion for a continuance or the request for protection.

(3) "Essential Dates" include jury selection days, case management days, and other dates essential to the completion of trial on the list at issue.

(4) "Request for Protection" is defined as an informal, non-docketed written request that a case not be called for trial on one or more specified days of a trial list and which, if allowed, would not effectively remove a case from a trial list. A request for protection shall only be acted upon by a judge and shall not take the place of or be treated as a motion for continuance.

(5) "Scheduled" is defined as follows: (i) For trial list cases, "scheduled" means a case has been assigned to a trial list as that term is defined in this rule; (ii) for all other cases, "scheduled" means that a date certain has been identified for a hearing or trial.

(6) "Trial list" means the list of a group of cases assigned to an actual, discrete period of time. A trial list is not simply a list of cases ready for trial. Rather, it is a list for a trial session that has beginning and ending dates, consists primarily of consecutive court days, and realistically exposes all of the assigned cases to trial.

(b) Assignment for Trial.

(1) *Jury Trial List.* In those actions set for a jury trial, the clerk of the Superior Court shall maintain a Jury Trial List. Scheduling of actions for trial from the lists shall be at the direction of the court.

(2) *Nonjury Trial List.* The court may by order provide for the setting of cases for nonjury trial upon the calendar. All actions, except those otherwise governed by statute or court orders shall be in order for trial at a time set by the court on such notice as it deems reasonable, but not less than 10 days after the scheduled completion of any discovery and expiration of time for filing any motions.

(c) Continuances. A motion for a continuance order shall be made immediately after the cause or ground becomes known. The motion must specify (1) the cause or ground for the request; (2) when the cause or ground for the request became known; and (3) whether the motion is opposed. If the position of the other party or parties cannot be ascertained, notwithstanding reasonable efforts, that shall be explained. Telephonic or other oral notice of the motion shall be given immediately to all other parties. The fact that a motion is unopposed does not assure that the requested relief will be granted. Continuances should only be granted for substantial reasons.

(d) Protections. A request for a protection from a trial list shall be made immediately after the cause or ground becomes known, and shall be submitted in a written Uniform Request for Protection Form or in a writing containing substantially the same information.

Advisory Committee Note—January, 2006

Criminal Rule 25-A, adopted today is similar to Civil Rule 40, with appropriate adjustment to recognize the differing nature of criminal cases and criminal scheduling. These amendments are designed to promote greater uniformity and predictability with respect to court event scheduling. A key determinant of event certainty in the courts is the application of uniform and predictable approaches to continuances and protections. The absence of uniformity and predictability results in more frequent postponements of scheduled court events that increase the time, expense, and clerical work associated with the resolution of disputes. The revised rule is intended to make the public and the courts more mindful of the long-term negative consequences that event uncertainty has on the public, judicial resources and, ultimately, the administration of justice.

The rule provides clear guidance as to when an informal request for protection should be submitted in lieu of a formal motion for a continuance. A request for protection is an important feature of active trial list management by the court. A conflict during a trial list should be addressed by way of a request for protection, rather than a motion for a continuance order, if the granting of the request will not "effectively remove a case from a trial list" as that term is defined by the rule. The revised rule should encourage the public and the bar to make greater use of protections in lieu of continuances, and cause judges, when responding to requests for protection, to actively manage the scheduling of cases prior to and during a defined trial list period.

The definition of "Trial list" corresponds with the Judicial Branch's effort to adopt effective practices surrounding the organization and judicial management of trial lists. Trial list periods and the assignment of cases to trial lists will be made in accordance with standards established by the Judicial Branch for the various case types.

The revised rule provides that continuances may be granted for substantial reasons so that the judicial process does not become unnecessarily onerous or unduly burdensome to the public and the bar. Substantial reasons may include, but are not limited to, conflicts arising from (1) another scheduled court event that is a

higher priority case as determined by the priority of cases established by the Supreme Judicial Court; (2) another scheduled court event in another jurisdiction; (3) long-standing travel or vacation plans of a party or attorney; (4) unforeseen witness unavailability; (5) unexpected family-care responsibilities; and (6) other unforeseeable reasons such as illness or death.

Advisory Note – October 2013

The amendment omits the hyphen in the rule number to maintain consistency with the other rules.

RULE 26. EVIDENCE

(a) Form. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Maine Rules of Evidence or other rules adopted by the Supreme Judicial Court.

(b) Examination of Witnesses. The examination and cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of court, and counsel shall stand while so examining or cross-examining unless the court otherwise permits. Any re-examination of a witness shall be limited to matters brought out in the last examination by the adverse party, except by special leave of court.

(c) Order of Evidence. A party who has rested a case cannot thereafter produce further evidence except in rebuttal unless by leave of court.

(d) Attorney Not to be Witness. No attorney shall be permitted to be a witness for his or her client before a jury without special permission of the court.

(e) Allegation of Prior Conviction; Procedure. In a trial to a jury in which the prior conviction is for a crime that is identical to the current principal crime or is sufficiently similar that knowledge of the fact that the defendant has been convicted of the prior crime may, in the determination of the presiding justice, unduly influence the ability of the jury to determine guilt fairly, that portion of the charge alleging the prior conviction shall not be read to a jury until after conviction of the principal crime, nor shall the defendant be tried on the issue of whether he or she was previously convicted until after conviction of the principal crime, unless the prior conviction has been admitted into evidence for another reason. The jury that found the defendant guilty of the current principal

crime shall determine whether the defendant was convicted of the prior alleged crime unless that jury has been discharged prior to the filing of an amended indictment, if required to charge the prior conviction.

(f) Marking of Exhibits; Insurance for Valuable Exhibits. The parties shall mark their exhibits prior to trial or hearing or during a recess. A party who offers a valuable exhibit shall be responsible for procuring insurance for it.

(g) Election by Unrepresented Defendant. In a trial involving an unrepresented defendant, the court shall: (A) advise an unrepresented defendant, out of the presence of the jury, of the necessity of choosing between exercising the right to remain silent and exercising the right to testify; (B) ensure that the defendant understands these alternative rights; and (C) give the defendant the opportunity to make an election between them. If the defendant elects to testify, the court shall advise the defendant how and when the right to testify may be exercised.

Advisory Committee Note—1976

[M.R. Crim. P. 26.] These amendments are to be effective February 2, 1976 to coincide with the effective date of the Maine Rules of Evidence. Their purpose is to bring the Rules of Criminal Procedure into conformity with the Rules of Evidence.

Advisory Committee Note—2000

[M.R. Crim. P. 26(e).] New subdivision (e) to Rule 26 is added as a consequence of both the repeal of 15 M.R.S. § 757 and the enactment of 17-A M.R.S. § 9-A in its stead. *See* P.L. 1999, ch. 196, *effective* September 18, 1999. Subsection 1 of section 9-A directs that "[t]he Supreme Judicial Court shall provide by rule the manner of alleging the prior conviction in a charging instrument *and conditions for using that prior conviction at trial*." (emphasis supplied). The new subdivision is similar in substance to former 15 M.R.S. § 757(2).

Advisory Committee Note—2003

[M.R. Crim. P. 26(d).] The amendment modifies paragraph (d) in two respects. The amendment abrogates that portion prohibiting an attorney from providing bail or recognizance as surety for a client for two reasons: (1) any

prohibition relating to bail is inappropriately included within Rule 26, a rule that addresses trial "evidence"; (2) if the matter is to be addressed by rule at all, it is better left to the Advisory Committee on Professional Responsibility. *See* M. Bar. R. 3.7(d). The amendment also simplifies the current language of the remaining portion of paragraph (d) prohibiting an attorney, without court permission, from testifying before a jury on behalf of a client.

[M.R. Crim. P. 26(e).] The amendment adds the words "or she" in the first sentence in order to make the subdivision gender neutral.

Advisory Note - June 2006

M.R. Crim. P. 26(f). The amendment incorporates in the rule the provisions of Administrative Order JB-05-23, *Marking, Removal, and Disposal of Exhibits in Criminal Actions*, effective August 1, 2005, that deal with the marking of exhibits and insurance for valuable exhibits.

Advisory Note – 2007

M.R.Crim.P. 26(g). In *State v. Tuplin*, 2006 ME 83, 901 A.2d 792, the Law Court sharply divided over whether the unrepresented defendant in that case had been adequately advised of his competing rights to testify or to remain silent. But all the Justices agreed that the "best practice" was to advise the unrepresented defendant of the need for an election between these rights. The amendment seeks to incorporate this "best practice" into Rule 26.

RULE 27. RECORDING AND TRANSCRIPTS OF PROCEEDINGS

(a) Proceedings Recorded. All proceedings in the District Court or the Superior Court shall be electronically recorded or taken down by a court reporter. All transcripts of trial court proceedings held in the District Court or the Superior Court shall be reproduced in accordance with M.R. Civ. P. 5(i)(2).

(b) Preservation of Record. In all other respects, Rule 76H of the Maine Rules of Civil Procedure governs the procedure for electronic recording in criminal cases, except that all recordings and records pertaining to a criminal proceeding shall be retained until the expiration of any sentence that is longer than the retention period provided for such recordings and records in civil cases by civil Rule 76H(e).

(c) Expenses. Upon appropriate motion, the court shall direct that the state bear any expense for listening to recordings by or preparation of a transcript for indigent defendants who qualify for the assignment of counsel pursuant to Rule 44.

Advisory Committee Note—1976

[M.R. Crim. P. 27.] These amendments are to be effective February 2, 1976 to coincide with the effective date of the Maine Rules of Evidence. Their purpose is to bring the Rules of Criminal Procedure into conformity with the Rules of Evidence.

Advisory Committee Note—1983

[M.R. Crim. P. 27.] This rule is intended to standardize practice and facilitate appellate review. For example, if a court reporter does not take down a closing argument, it may disable a reviewing court from fully assessing a challenge to jury instructions.

The rule builds upon the recording requirements of 4 M.R.S. § 651, which are taken—for criminal cases—as minimum, but not maximum, requirements.

Advisory Committee Note—1988

[M.R. Crim. P. 27.] The amendment conforms the rule to a recently enacted statute permitting electronic recording of certain Superior Court proceedings. P.L. 1987, ch. 152.

Advisory Committee Note—1989

[M.R. Crim. P. 27.] Rule 27(a) incorporates the language of former Rule 27. Rule 27(b) incorporates the language of former District Court Rule 39A.

Advisory Committee Note—1993

[M.R. Crim. P. 27.] Chapter 591 of the 1991 Public Laws enacted 4 M.R.S. § 651-A, which provides:

§ 651-A. Production of reviewable record

> The Supreme Judicial Court shall prescribe rules that ensure the production of a reviewable record of proceedings before all state courts within the Judicial Department.

The Chief Justice of the Superior Court has recommended to the Committee that Rule 27 be amended to capitalize on the flexibility provided by Chapter 591 and has drafted the amendment submitted to the Court. The Committee is satisfied that the Chief Justice will use the flexibility supplied by the amendment to ensure that any recording system employed is reliable and accurate.

Advisory Note – 2009

M.R.Crim.P. 27(a). The amendment deletes the first sentence of the subdivision both to eliminate the current requirement that all jury proceedings in the Superior Court must be taken down by a court reporter and to eliminate, as unnecessary, the current references to specific portions of a jury proceeding that must be taken down. Jury proceedings, like all other proceedings in the Superior Court, may now either be electronically recorded or taken down by a court reporter. *See also* Advisory Note – 2009 to M.R.Crim.P. 6(d).

Advisory Note—July 2010

The amendment modifies Rule 27 in two respects. First, it collapses subdivisions (a) and (b) into a single subdivision to reflect the current practice that all proceedings in criminal cases in both the Superior Court and the District Court are recorded. Second, it clarifies in subdivision (c) [formerly subdivision (d)] that only those defendants entitled to assignment of counsel, pursuant to Rule 44, may have the state bear the expense for listening to a recording or preparing a transcript of a proceeding.

Advisory Committee Note – July 2012

This amendment to Rule 27 changes the name of the rule to indicate that it also governs transcripts and requires parties to file condensed transcripts in accordance with M.R. Civ. P. 5(i)(2).

RULE 28. COURT-APPOINTED INTERPRETERS AND TRANSLATORS

The court may provide, or when required by administrative order or statute shall provide, to individuals eligible to receive court-appointed interpretation or translation services, an interpreter or translator and determine the reasonable compensation for the service when funded by the court. An interpreter or translator shall be appropriately sworn.

Advisory Committee Note—1976

[M.R. Crim. P. 28.] These amendments are to be effective February 2, 1976 to coincide with the effective date of the Maine Rules of Evidence. Their purpose is to bring the Rules of Criminal Procedure into conformity with the Rules of Evidence.

Advisory Committee Note—1984

[M.R. Crim. P. 28.] The amendment deletes language thought to be unnecessary.

Advisory Note – 2008

M.R.Crim.P. 28. The amendment does two things. First, it adds the term "translator" to the existing term "interpreter". No attempt is being made by this change to distinguish the services performed by either; rather the change is to ensure that all communication services, oral or written, needed by persons with limited English proficiency or individuals whose primary language is American Sign Language or individuals who are deaf or hard-of-hearing are included. Second, it brings the rule into conformity with current administrative order and statutory requirements. *See* Administrative Order JB-06-3, *Guidelines for Determination of Eligibility for Court-Appointed Interpretation and Translation Services*, effective October 11, 2006 (addressing persons with limited English proficiency in Maine's state courts other than individuals who are deaf or hard-of-hearing); 5 M.R.S. § 48-A (Supp. 2006), entitled "Communication services for deaf persons and hard-of-hearing persons in court and other legal settings;" and 32 M.R.S. Chapter 22 [§§ 1521-1531] (Supp. 2006), entitled "American Sign Language, English Interpreters and Transliterators."

RULE 29. MOTION FOR ACQUITTAL

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more crimes charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such crime or crimes. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right. If a motion for judgment of acquittal is made at the close of all evidence, the court may reserve the decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(b) Motion After Discharge of Jury. If the jury returns a verdict of guilty, or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 10 days after the jury is discharged or within such further time as the court may fix during the 10 day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. A motion for new trial shall be deemed to include a motion for judgment of acquittal as an alternative.

Advisory Committee Note—1989

[M.R. Crim. P. 29(a).] The language of new Rule 29(a) provides that a motion for judgment of acquittal is available when trial is on a complaint as well as when it is on an indictment or an information.

RULE 30. ARGUMENT OF COUNSEL; INSTRUCTIONS TO JURY

(a) Time for Argument. After the evidence is closed, argument to the jury or to the court shall be permitted. The time for argument, which shall be fixed and definite, shall be set by the court prior to argument.

The attorney for the state shall argue first. The attorney for each defendant shall then argue. The attorney for the state shall then be allowed time for rebuttal.

(b) Instructions to Jury. At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing and presence of the jury.

The court, at its election, may provide written instructions to the jury covering all or a part of what is orally provided.

Advisory Committee Note—1982

[M.R. Crim. P. 30(a).] One hour per side is too much time for closing arguments in most cases involving Class D and E crimes. The presiding justice is given discretion to set an appropriate time limit. It is contemplated that Class D and E cases will get around 20 minutes, that the more serious criminal cases will continue to get an hour, and that cases in between will get an intermediate time limit.

Advisory Committee Note—1989

[M.R. Crim. P. 30(a).] The language of new Rule 30(a) incorporates the order of argument from former District Court Rule 30.

Advisory Committee Note—1994

[M.R. Crim. P 30(b).] The amendment makes two changes of substance. First, the trial court will no longer be precluded from instructing the jury before argument of counsel. As under present Rule 51(b) of the Maine Rules of Civil Procedure, the trial court, at its election, will be free to instruct the jury before or after argument, or both. This latitude may, in certain cases, improve the effectiveness of final arguments as well as enhance jury understanding. Second, the rule addresses for the first time the actual form of the jury charge. As under 14 M.R.S. § 1105 (1980), the trial court, at its election, will be free to use written as

well as oral instructions. Unlike the statute, however, the rule retains the current practice of the trial court in criminal cases of always giving full oral instructions, subject to discretionary written supplementation. This latitude may, in certain cases, enhance jury understanding.

RULE 31. JURY VERDICT

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the justice in open court, in the presence of the defendant or defendants.

(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberation may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(d) Verdict on Nonbusiness Days and After Hours. The court may receive a verdict on any nonbusiness day or outside business hours, from a jury that commenced its deliberations on a regular business day.

Advisory Committee Note—1976

[M.R. Crim. P. 31(c).] This amendment is not intended to make any change in the law. It is merely a recognition that the determination of what is a lesser included offense is more a matter of substantive law than procedural law. See: *State v. Leeman*, Me., 291 A.2d 709 (1972). For this reason, it is probably beyond the scope of the rule making power to seek to define what shall be considered a lesser included offense. See: 4 M.R.S. § 9.

Advisory Committee Note—1983

[M.R. Crim. P. 31(c).] The subject of lesser included offenses is now covered comprehensively by statute. 17-A M.R.S. § 13-A. Rule 31(c) now fails to accurately state the law; but more importantly, as a procedural rule it is an inappropriate vehicle for conveying the substantive law of lesser included offenses.

Advisory Committee Note—1989

[M.R. Crim. P. 31.] The heading of new Rule 31 is clarified by adding the word "JURY" before the word "VERDICT." Fortner subdivisions "(d)" and "(e)" are now subdivisions "(c)" and "(d)."

Advisory Committee Notes—2000

[M.R. Crim. P. 31(d).] This amendment, in addition to making certain formalistic changes, replaces the phrase "a court holiday" with "any nonbusiness day" because the phrase "court holiday" is now used in amended Rule 5(a) and new Rule 5C(a) to include those nonjudicial days, although not a weekend or legal holiday, in which the court is simply not available due to, for example, judicial conferences, employee vacations, sickness or inclement weather. *See* Advisory Committee Note to M.R. Crim. P. 5.

VI. JUDGMENT

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence.

(1) *Timing*. Sentence shall be imposed without unreasonable delay, provided, however, that the court may suspend the execution thereof to a date certain or determinable.

In circumstances other than addressed in Rule 38, if a stay of execution has been ordered and if at the conclusion of the stay the defendant fails to surrender into the custody of the sheriff named in the commitment order, upon the request of the named sheriff or the attorney for the state, or by direction of the court, the clerk shall issue a warrant for the defendant's arrest.

(2) *Allocution on a Conviction.* Before imposing sentence on a Class C or higher crime, the court shall address the defendant personally and inquire if the defendant desires to be heard prior to the imposition of a sentence. In a Class D or E crime the court may address the defendant and inquire if the defendant desires to be heard prior to the imposition of sentence. The defendant may be heard personally or by counsel or both. Failure of the court to so address the defendant

shall not affect the legality of the sentence unless the defendant shows that he or she has been prejudiced thereby.

(3) *Statement of Reasons for Sentence of Imprisonment of One Year or More.* If the court imposes a sentence of one year or more, it shall set forth on the record the reasons for the sentence. This requirement shall also apply in cases in which there has been a plea agreement. In a case in which there is a sentence of less than one year's imprisonment, the court may set forth on the record its reasons for the sentence. Noncompliance with this requirement shall not affect the legality of the sentence; however, it may affect appellate review by the Law Court.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings and the adjudication, sentence, the defendant's date of birth and, when known, the defendant's State Identification Number. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. A judgment of conviction shall be signed by the justice or judge and entered by the clerk.

(c) Pre-sentence Investigation.

(1) *When Made.* The court may in its discretion direct the State Division of Probation and Parole to make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation. The report shall not be submitted to the court or its content disclosed to anyone unless the defendant has pleaded or has been found guilty.

(2) *Content of Report.* The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information on the defendant's characteristics, the defendant's financial condition, and the circumstances affecting the defendant's behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) *Access to Written Pre-sentence Report.*

(A) In any case in which the court has ordered a written pre-sentence report, in order to ensure that the defendant or, if the defendant is represented by counsel, both the defendant and the defendant's counsel are accorded an opportunity to examine the content of the report, sentence shall not be imposed until at least 48 hours after the report is filed with the clerk of the court, unless this

time period is waived by the defendant. Consent of the defendant, if given, shall be made a part of the record. The clerk shall mail a date-stamped copy of the written pre-sentence report to the defendant or, if represented by counsel, to counsel and note the mailing in the criminal docket. Before imposing sentence, the court shall afford the defendant, counsel for the defendant, or both an opportunity to comment upon the pre-sentence report as well as upon any information from confidential sources withheld from the written pre-sentence report and presented at the time of sentencing.

(B) Access to Written Pre-sentence Report by the State. At the time the clerk mails a date-stamped copy of the written pre-sentence report pursuant to (A) above, the clerk shall mail a date-stamped copy of that report to the attorney for the state and note the mailing in the criminal docket.

(4) *Opportunity to Hear and Comment Upon Information Presented in an Oral Pre-sentence Report.* In any case in which the court has ordered an oral pre-sentence report, before imposing sentence, the court shall afford the defendant, counsel for the defendant, or both an opportunity to both hear and comment upon any information presented as part of the oral pre-sentence report.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed.

Advisory Committee Note—1971

[M.R. Crim. P. 32(d).] Under the original Rule 32(d) a defendant may, after entry of a plea of guilty, and after sentence, withdraw a plea of guilty in order to correct manifest injustice. The granting of this right is within the discretion of the trial judge. No time limit is imposed upon the right. Federal authorities construing the comparable federal rule have held that the motion to withdraw may be made at any time. This provision could cause some difficulty because the basis for a motion under Rule 32(d) is most frequently the same kind of defect that can be raised pursuant to Maine's post-conviction relief statute. The usual allegations in support of a motion under Rule 32(d) are: mistake, inadvertence, ignorance, perjured testimony, and fear which overcame the defendant's exercise of his free judgment. (For a general discussion of Rule 32(d), see 8A Moore's Federal Practices §§ 32.07[3] & [4].) All of these matters may be raised in a proceeding for post-conviction relief under the Maine statute. It therefore seems unnecessary and unduly complicated to have a second procedure available in Rule 32(d).

A further difficulty with the existence of the right to relief under Rule 32(d) is that relief may be granted by a single Superior Court justice with no method for the State to secure review of that determination. Whereas, if relief is granted pursuant to the post-conviction relief statute, the State may appeal to the Law Court. The only possible benefit to a defendant in proceeding under Rule 32(d) rather than under the post-conviction statute, other than the lack of the right of appeal in the State, is that there is no requirement in the proceeding under Rule 32(d) that the defendant be in custody. Thus, it is conceivable that under Rule 32(d) a defendant who has fully served his sentence following the entry of a plea of guilty may move to withdraw that plea and set aside the judgment of conviction. Cf. Thoreson v. State, 239 A.2d 654 (Me. 1968).

Since it was the belief of the Committee that the existence of this alternative remedy when Maine has a comprehensive post-conviction relief procedure is not only unwise but likely to lead to confusion and complications, Rule 32(d) is amended.

Advisory Committee Note—1983

[M.R. Crim. P. 32(e).] Eligibility for probation is now covered comprehensively by statute. 17-A M.R.S. § 1201. Rule 32(e) is an incomplete statement of the law; more importantly, as a procedural rule, it is an inappropriate vehicle for conveying the substantive law of probation eligibility.

[M.R. Crim. P. 32(f).] The substance of the first sentence of 32(f) is wholly controlled by 17-A M.R.S. § 1206. The third sentence is premised upon a practice which is no longer permitted by statute. Title 17-A, Chapter 49. Finally, both sentences address matters of substantive law rather than procedure.

Advisory Committee Note—1984

[M.R. Crim. P. 32(a).] The amendment requires a statement of sentencing reasons in those cases where a sentence of imprisonment may be appealed to the Appellate Division of the Supreme Judicial Court and encourages a statement of sentencing reasons in any other case. This requirement would help focus the decision-making of the sentencing judge, as well as facilitate the work of the Appellate Division. Sentencing reasons were required by statute prior to 1976. 15 M.R.S. § 1743 (1964). Section 1743 was one of many sections included in the list of repealers accompanying the enactment of the Criminal Code in 1976. P.L. 1975, ch. 499, § 2. No explanation was given for the repeal and a 1976 law review article

suggests that the repeal may have been inadvertent. Zarr, *Sentencing*, 28 Me. L. Rev. 117, 148 n.107 (1976).

Advisory Committee Note—1988

[M.R. Crim. P. 32(c)(2).] The amendment and new Rules 32(c)(3) and (4) reorganize and make several substantive changes in the rules governing reports of pre-sentence investigations. Rule 32(c)(2), governing the content of reports of pre-sentence investigations, is the same as the first sentence of former Rule 32(c)(2).

New Rule 32(c)(3) addresses access to the written pre-sentence report by the parties. The approach to access presently found in the Administrative Order of the Supreme Judicial Court dated December 7, 1982 (the existence of which is not well known) has been substantially modified in an effort to protect more effectively a defendant's due process rights to both timely access to the report and opportunity to dispute any facts contained therein. As to these due process rights, see generally *State v. Dumont*, 507 A.2d 164, 166 (Me. 1986).

New Rule 32(c)(4) governs the right of the defense to both hear and comment upon information presented as part of an oral pre-sentence report.

[M.R. Crim. P. 32(c)(3) and (4).] See Advisory Committee Note to amendment to Rule 32(c)(2).

Advisory Committee Note—1989

[M.R. Crim. P. 32(a)(2).] Language is added to new Rule 32(a)(2) to make clear that in a Class D or Class E crime the court is not required to address a defendant personally to inquire if he or she desires to be heard to prior to sentencing. Former subdivision "(f)" is now "(e)."

Advisory Committee Note—1989

[M.R. Crim. P. 32(a)(3).] The amendment removes an outdated reference to "Appellate Division" in light of P.L. 1989, ch. 218, effective Sept. 30, 1989 (15 M.R.S. §§ 2151-2157). The Law Court now performs the sentence review function previously carried out by the Appellate Division of the Supreme Judicial Court.

Advisory Committee Note—1990

[M.R. Crim. P. 32(c)(3)(A) and (B).] Rule 32(c)(3) is amended by deleting the references to Superior Court to make clear that the rule is applicable to both the District and Superior courts.

Advisory Committee Note—1991

[M.R. Crim. P. 32(d).] This amendment updates the rule by removing language that is no longer relevant. The authority to continue a matter prior to imposition of sentence was repealed effective May 1, 1976. See 34 M.R.S. § 1631 (1964), *repealed by* P.L. 1975, ch. 499, § 70.

Advisory Committee Note—1994

[M.R. Crim. P. 32(e).] Legislation has now incorporated the substance of Rule 32(e) into 17-A M.R.S. § 1206(2). See P.L. 1993, c. 234, § 1. This change was anticipated by the amendment last year of Rule 1(b), the Advisory Committee Note to which stated that "the fragmentary provision contained in Rule 32(e) should be deleted once the corresponding change is made to the statute") (Me. Rptr. 602-17 A.2d CIX).

Advisory Committee Note—2002

[M.R. Crim. P. 32(a)(1).] The amendment clarifies the arrest process in the event a defendant fails to surrender himself or herself into custody at the conclusion of a court-ordered stay of execution, other than a stay pending appeal already addressed in Rule 38.

RULE 33. NEW TRIAL

The court on motion of the defendant may grant a new trial to the defendant if required in the interest of justice. If the trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct entry of a new judgment.

A motion for a new trial based on any ground other than newly discovered evidence shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period. Any motion for a

new trial based on the ground of newly discovered evidence may be made only before, or within 2 years after, entry of the judgment in the criminal docket.

If an appeal is pending, the clerk of the court shall immediately send notice to the clerk of the appellate court of the filing of such a motion; the court shall conduct a hearing and either deny the motion or certify to the appellate court that it would grant the motion, but the court may grant the motion only on remand of the case.

Advisory Committee Note—1978

[M.R. Crim. P. 33.] Rule 33 is amended to clarify the procedure for handling motions for new trial on the ground of newly discovered evidence when an appeal is pending. It authorizes the Superior Court to hold a hearing on the motion and to deny it. If the Superior Court Justice would grant the motion, he is to file a certificate in writing with the clerk stating that he would grant the motion, which certificate should be filed, docketed and forwarded to the clerk of the Law Court. The Law Court may then either immediately remand the case to permit the Superior Court Justice to grant the motion for a new trial or it may elect to decide the appeal before remanding the case. In the latter event if the Law Court sets aside the judgment and orders a new trial there would be no occasion for the Superior Court Justice to formally grant the motion for a new trial on remand. However, if the judgment is affirmed by the Law Court, upon remand the Superior Court Justice could then enter an order granting the new trial on the ground of newly discovered evidence. If the Superior Court denies the motion while an appeal is pending, defendant may appeal from that denial and supplement the record in the Law Court in order that the denial of a motion for a new trial may be considered along with the basic appeal.

Advisory Committee Note—1979

[M.R. Crim. P. 33.] Rule 33 is reparagraphed to make clear that the last paragraph applies to any motion for a new trial, irrespective of the ground therefor.

Advisory Committee Note—1992

[M.R. Crim. P. 33.] The amendment replaces the undefined phrase “final judgment” with the well-understood phrase “entry of the judgment in the criminal docket” to make clear that the two-year period for filing a motion for new trial based on the ground of newly discovered evidence is to be triggered by the date of

entry of the judgment of conviction in the criminal docket. The phrase "final judgment" is ambiguous in meaning since, although it can be read to refer to the entry of judgment, it also can be read to refer to a wholly different triggering mechanism—namely, the date on which the appellate process is concluded if any appeal is taken or, if no appeal is taken, the last day on which an appeal could have been taken. 1 Cluchey & Seitzinger, *Maine Criminal Practice*, § 33.5 at 33-12 and 33-12.1 (1990).

RULE 34. ARREST OF JUDGMENT

The court on motion of a defendant shall arrest judgment if the indictment, information or complaint does not charge a crime or if the court was without jurisdiction of the crime charged. The motion in arrest of judgment shall be made prior to the entry of judgment or within 10 days thereafter or within such further time as the court may fix during the 10-day period.

RULE 35. CORRECTION OR REDUCTION OF SENTENCE

(a) Correction of Sentence. On motion of the defendant or the attorney for the state, or on the court's own motion, made within one year after a sentence is imposed, the justice or judge who imposed sentence may correct an illegal sentence or a sentence imposed in an illegal manner.

(b) Reduction of Sentence Before Commencement of Execution. The justice or judge who imposed sentence may reduce a sentence prior to the commencement of execution thereof.

(c) Reduction of Sentence After Commencement of Execution.

(1) *Timing of Motion.* On motion of the defendant or the attorney for the state, or on the court's own motion, made within one year after a sentence is imposed and before the execution of the sentence is completed, the justice or judge who imposed sentence may reduce that incompleted sentence.

(2) *Ground of Motion.* The ground of the motion shall be that the original sentence was influenced by a mistake of fact which existed at the time of sentencing.

(d) Definitions. A sentence is the entire order of disposition, including conditions of probation, suspension of sentence, and whether it is to be served concurrently with, or consecutively to, another sentence.

A revision of sentence from imprisonment to probation is a permissible reduction of sentence.

A reduction of sentence is either an obvious reduction or a change of sentence to which the defendant consents.

(e) Power of Trial Court Pending an Appeal. If an appeal is pending, the clerk shall immediately send notice to the clerk of the appellate court of the filing of the motion made under subdivisions (a) or (c) of this Rule; the court shall conduct a hearing and either deny the motion made under subdivisions (a) or (c) or certify to the appellate court that it would grant the motion, but the court may grant the motion only on remand of the case.

(f) Appeal by Defendant. A defendant may appeal from an adverse ruling of the District Court made under subdivision (a) or (c) to the Superior Court as provided under Rules 36, 36A and 36D. The determination by the Superior Court is final and no further relief is available. A defendant may appeal from an adverse ruling of the Superior Court made under subdivision (a) or (c) to the Law Court as provided by the Maine Rules of Appellate Procedure.

(g) Appeal by State. The Maine Rules of Appellate procedure governs the procedure for an appeal by the state to the Law Court from an adverse ruling of the Superior Court relative to a state-initiated motion made under subdivision (a) or (c) of Rule 35. The Maine Rules of Appellate Procedure also governs the procedure for an appeal by the state to the Law Court from an adverse ruling of the Superior Court relative to a defendant-initiated appeal under subdivision (f).

Advisory Committee Note—1971

[M.R. Crim. P. 35(b)(6).] Rule 35(b)(6) is a new provision suggested to accommodate the amendment of 14 M.R.S. § 5508 (Maine Laws, 1971, c.342). Since a petitioner may not proceed with his appeal in a post-conviction proceeding until issuance of a certificate of probable cause, the time limits of Rule of Civil Procedure 74(a) should not commence to run until after the issuance of the certificate.

There is one ambiguity in the statute which the Rule seeks to eliminate. The statute provides: "The clerk of the Superior Court, upon receipt of a notice of appeal, shall forward to the law court the complete record of the proceedings in the Superior Court." It is not clear whether this means the record in the post-conviction proceeding or the record in the post-conviction proceeding together with the complete record in the criminal proceeding. Since the purpose of the certificate of probable cause is to determine if there is any merit in the appeal from the decision in the post-conviction proceeding, the Law Court should only consider the record in that proceeding and not be required to comb the entire record in the original criminal case. The last sentence of the rule seeks to accomplish that objective.

Advisory Committee Note—1973

[M.R. Crim. P. 35(b)(6).] Subdivision (b)(6) of Rule 35 is amended in order to make it clear that appeals in post-conviction proceedings are civil appeals. This becomes most important with the change in procedure for handling criminal appeals since counsel handling appeals in post-conviction proceedings will be required to refer to the Civil Rules in order to be sure that the proceeding is handled properly. The decision to consider appeals in post-conviction proceedings as civil appeals is based upon the statute. 14 M.R.S. § 5508 prior to its amendment in 1971 read: "A final judgment entered under § 5505 may be reviewed by the Supreme Judicial Court sitting as a law court in an appeal brought by the petitioner or the state in the same mode and scope of review as any civil action." Although the amendment of the statute in 1971 eliminated this language and instituted the requirement of a certificate of probable cause if the petitioner appealed the statute as amended does contain the following language: "If an appeal is taken by the state, a certificate of probable cause is not required but shall be in accordance with the Civil Rules." It obviously makes no sense to have an appeal by the state taken in accordance with the Civil Rules and an appeal by the petitioner taken in accordance with the Criminal Rules.

Advisory Committee Note—1985

[M.R. Crim. P. 35.] Subdivision (a) expands the time for making a motion to correct an illegal sentence or a sentence imposed in an illegal manner, thereby obviating unnecessary appeals or petitions for post-conviction review during this period. Certain sentencing matters are outside the scope of the rule, as, for example, the resentencing provided for in 17-A M.R.S. § 1256(G).

Subdivision (b) carries forward the provision in present Rule 35 that a justice may revise a sentence prior to the commencement of execution thereof. The word "reduce" is used instead of the word "revise," since a reduction is what is intended. Revision has not been thought to include anything but reduction in present Rule 35 and the amendment does not disturb that understanding. If there is doubt about whether a change of sentence constitutes a reduction, the consent of the defendant to the change should be obtained.

Subdivision (c) carries forward so much of the court's power to reduce a sentence based upon a mistake of fact at the time of sentencing as was declared constitutional in *State v. Hunter*, 447 A.2d 797 (Me. 1982). An example of a mistake of fact which might support a reduction of sentence is a mistake about the nature or extent of a defendant's criminal record.

Advisory Committee Note—1989

[M.R. Crim. P. 35(e).] The new provision treats motions brought under Rule 35(a) or (c) during the pendency of an appeal in the same manner as Rule 33 motions. The new procedure allows the full integration of Rule 35(a) or (c) motions into the appeal process, a result particularly desirable in light of the new mechanism for sentence review created by P.L. 1989, ch. 218 (15 M.R.S. §§ 2151-2157).

Advisory Committee Note—1992

[M.R. Crim. P. 35(c)(1).] The previous language appeared to require that the motion not only be filed within one year after sentence imposition but that final court action relative to that motion occur within the one-year period. *State v. Gagne,* 570 A.2d 825, 826 (Me. 1990); 1 Cluchey & Seitzinger, *Maine Criminal Practice*, § 35.3 at 35-15 (1990). The new language in subparagraph 1 of paragraph c is designed to make clear that, like a motion brought to correct a sentence under paragraph a (*Id*. at § 35.2 at 35-11), the trial court has the power to act upon a timely motion even after the expiration of the one-year period.

Advisory Committee Note—1996

[M.R. Crim. P. 35(f).] The amendment identifies the appeal mechanism available to a defendant relative to the denial of a Rule 35 motion brought under subdivision (a) or (c) in both District Court and Superior Court. It further makes a

defendant's Rule 35 appeal to the Law Court conditioned upon the issuance of a certificate of probable cause pursuant to new Rule 37C.

[M.R. Crim. P. 35(g).] The amendment is in recognition of the recent statutory changes to 15 M.R.S. § 2115-A authorizing the state to appeal to the Law Court from the denial of a state-initiated Rule 35 motion for correction or reduction of sentence. *See* P.L. 1995, ch. 47, *effective* September 29, 1995.

Advisory Committee Notes—2001

[M.R. Crim. P. 35(f).] This amendment is one of many significant modifications to the appellate rules in Part VII in response to statutory changes made at the Second Regular Session of the 119th Legislature in P.L. 1999, chapter 731, Part ZZZ, *effective* (as relevant here) January 1, 2000—changes proposed by the Court Unification Task Force (a body established pursuant to Resolves 1998, chapter 107) in its final report to the joint standing committee of the Legislature having jurisdiction over judiciary matters. The Legislature has radically curtailed the statutory criminal appellate and review jurisdiction of the Superior Court. *See* P.L. 1999, ch. 731, § ZZZ-9. It is now limited to 3 areas: (1) hearing certain petitions and appeals as provided with the Maine Bail Code; (2) appeals from an adverse order of the District Court on a motion to correct or reduce a sentence pursuant to 15 M.R.S. § 2111 and M.R. Crim. P. 35(f); and (3) appeals from a District Court order revoking probation pursuant to 17-A M.R.S. § 1207(1) and M.R. Crim. P. 37F. Except as to these three exceptions, criminal appeals from the District Court are taken directly to the Law Court. *See* P.L. 1999, ch. 731, §§ ZZZ-15 and ZZZ-22 [defendant initiated] and ZZZ-18, ZZZ-20 and ZZZ-21 [state initiated]. Further, although the Superior Court has criminal appellate and review jurisdiction relative to the 3 above—described areas, it is no longer an "intermediate" appellate court for any defendant—initiated appeal. Instead, all defendant-initiated appeals now authorized are *final*—i.e., not subject to further appellate scrutiny by the Law Court. *See Id*. at §§ ZZZ-10 through ZZZ-14 and ZZZ-25. *See also* M.R. Crim. P. 35(f), as amended. The same holds true for any state—initiated appeals to the Superior Court as well. *See Id*. at § ZZZ-12. However, one hybrid situation exists under Rule 35 that treats the Superior Court's determination as *not* final. 15 M.R.S. § 2115-A (2-A)[P.L. 1999, ch. 731, § ZZZ-19] provides as follows:

2-A. *Appeal from adverse decision of the Superior Court sitting as an appellant [sic] court relative to an aggrieved defendant's appeal from the denial of a Rule 35 motion in District Court*. If a defendant's appeal to the Superior Court

sitting as an appellate court relative to a motion for correction or reduction of a sentence brought in District Court under Rule 35 of the Maine Rules of Criminal Procedure is granted in whole or in part, an appeal may be taken by the State from the adverse decision of the Superior Court to the Law Court.

To carry out the above-described Legislative directive, amendments have been made to Rules 35, 36, 36A, 36C, 36D, 37C, 37D, 37F, and 37G.

[M.R. Crim. P. 35(g).] *See* Advisory Committee Note to M.R. Crim. P. 35(f).

Advisory Committee Note—2002

[M.R. Crim. P. 35(f).] The amendment substitutes a reference to the Maine Rules of Appellate Procedure for former Rule 37C.

[M.R. Crim. P. 35(g).] The amendment substitutes a reference to the Maine Rules of Appellate Procedure for former Rule 37B.

Advisory Committee Note—2004

[M.R. Crim. P. 35 (f) and (g).] These amendments replace the word "order" with the word "ruling" in order to bring Rule 35 into conformity with Rule 19 of the Maine Rules of Appellate Procedure.

VII. APPEALS

RULE 36. APPEAL TO THE SUPERIOR COURT BY A DEFENDANT FROM AN ADVERSE RULING OF THE DISTRICT COURT PURSUANT TO RULE 35(a) or (c), FROM A REVOCATION OF PROBATION RULING, SUPERVISED RELEASE RULING OR ADMINISTRATIVE RELEASE RULING BY THE DISTRICT COURT PURSUANT TO 17-A M.R.S. §§ 1207, 1233 AND 1349-F RESPECTIVELY, OR FROM A DENIAL OF A PETITION SEEKING TO BE DECLARED INDIGENT FOR PURPOSES OF ASSIGNMENT OF COUNSEL ON APPEAL PURSUANT TO RULE 44A(c).

(a) Application. The Superior Court has appellate jurisdiction to entertain an appeal or petition from an aggrieved defendant in the District Court only in the following cases: an appeal or petition authorized by the Maine Bail

Code; an appeal from an adverse ruling of the District Court pursuant to 15 M.R.S. § 2111 and Rule 35(f); an appeal from a revocation of probation ruling in a probation revocation proceeding in the District Court pursuant to 17-A M.R.S. § 1207(1); an appeal from a revocation of supervised release ruling in a revocation of supervised release proceeding in the District Court pursuant to 17-A M.R.S. § 1233; an appeal from a revocation of administrative release ruling in a revocation of administrative release proceeding in the District Court pursuant to 17-A M.R.S. § 1349-F or an appeal from the denial of a petition seeking to be declared indigent for purposes of assignment of counsel on appeal or from the granting of a conditional order pursuant to 15 M.R.S. § 2111 and Rule 44A(c). When exercising its appellate and review jurisdiction, the determination by the Superior Court is final and no further appellate relief is available.

(b) How Taken. An appeal or petition to the Superior Court relative to bail in the District Court shall be as provided in the Maine Bail Code. An appeal seeking to be declared indigent for purposes of assignment of counsel on appeal shall be as provided in Rule 44A(c). An appeal from an adverse ruling of the District Court made pursuant to subdivisions (a) or (c) of Rule 35, an appeal from a revocation of probation ruling made pursuant to 17-A M.R.S. § 1206, an appeal from a revocation of supervised release ruling made pursuant to 17-A M.R.S. § 1233 or an appeal from a revocation of administrative release ruling made pursuant to 17-A M.R.S. § 1349-F, must be to the Superior Court in the county where the crime on which the order was rendered was committed and shall be taken by filing a notice of appeal with the clerk of the District Court.

(c) Time for Taking Appeal. The time within which an appeal may be taken shall be 21 days from the entry on the docket of the adverse order making final disposition, except that, upon a showing of excusable neglect, the judge may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal not exceeding 21 days from the expiration of the original time herein prescribed.

(d) Notice of Appeal. The notice of appeal shall set forth the title of the case and shall designate the adverse ruling making final disposition appealed from. The defendant or defendant's attorney shall file with the notice of appeal an order, as applicable, for either the transcript of the Rule 35 hearing, if held, or an order for the transcript of the revocation proceeding. The transcript order shall conform to Judicial Branch form number CR-165. The notice of appeal and transcript order shall be signed by the defendant or the defendant's attorney. If a notice is not signed, it shall not be accepted for filing. The clerk of the District Court shall mail

a date-stamped copy of the notice of appeal and the transcript order form to the attorney for the state and to the Office of Transcript Production of the Judicial Branch and note the mailing in the docket.

(e) Docketing Appeal in Superior Court. Upon receipt of the notice of appeal from the defendant, the clerk of the District Court shall mark the case "Appeal to the Superior Court" on the docket. The clerk shall then forthwith transmit a copy thereof together with a copy of all docket entries to the clerk of the Superior Court. Upon receipt of the copies of the notice of appeal and the docket entries, the clerk of the Superior Court shall forthwith docket the appeal and send each party of record a written notice of the docketing, the Superior Court docket number, and the date by which the record on appeal and the reporter's transcript must be filed.

(f) Further District Court Action. The District Court shall take no further action pending disposition of the appeal by the Superior Court except the assignment of counsel for an indigent defendant, the granting of stay of execution and, when permitted by statute, the fixing or revocation of bail pending appeal. The determination of indigency and the assignment and compensation of counsel shall be governed by the provisions of Rules 44, 44A, 44B, and 44C.

(g) Duty of Office of Transcript Production of the Judicial Branch to Prepare and File Transcript of Rule 35 Hearing or Revocation Proceeding. Unless the Superior Court otherwise directs, within 56 days of receipt of the date-stamped copy of the transcript order, the Office of Transcript Production of the Judicial Branch shall file with the clerk of the District Court in the case of an adverse ruling made under subdivisions (a) or (c) of Rule 35 a transcript of the Rule 35 hearing, if held, and in the case of a revocation ruling, a transcript of the revocation proceeding, and furnish copies to the parties.

If the Office of Transcript Production of the Judicial Branch anticipates that a 56-day time limit will not be met, the Office of Transcript Production shall file an application with the Superior Court requesting additional time at least 5 days before the expiration of the 56-day time limit. The Superior Court shall have discretion to grant reasonable enlargements of time. Notwithstanding this or any other provision of these rules, the party ordering the transcript shall exercise due diligence to assure its timely filing.

Following the filing of the ordered transcript, the clerk of the District Court will forthwith transmit it to the Superior Court.

(h) Statement in Lieu of Transcript.

(1) *Transcript Unavailable*. In the event an electronic recording of the proceedings is unavailable, the appellant's counsel may prepare a statement of the evidence or proceedings from the best available means, including counsel's recollection, for use instead of a transcript. This statement shall be served on appellee's counsel within 28 days after the filing of the notice of appeal. Appellee's counsel may serve objections or propose amendments thereto within 7 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the District Court for settlement and approval and, as settled and approved, shall be included in the record on appeal.

(2) *Transcript Unnecessary*. When the questions presented by an appeal can be determined without an examination of a transcript of proceedings in the District Court, the parties may prepare and sign a statement showing how the questions arose and were decided and setting forth only so many of the facts offered and proved or sought to be proved as are essential to a decision of the questions by the Superior Court. The statement shall include a concise statement of the points to be relied on by the appellant. It shall be submitted to the District Court within 28 days after the filing of the notice of appeal. If the statement conforms to the truth and is sufficiently complete, the District Court shall approve it for inclusion in the record on appeal.

(3) *Relief from Duty to Prepare Transcript by the Office of Transcript Production of the Judicial Branch.* If the parties agree that the preparation of a transcript of the District Court proceeding is unnecessary, they must forthwith seek an order from the Superior Court relieving the Office of Transcript Production of the Judicial Branch of its duty to prepare and file a transcript under subdivision (g).

(i) Correction of Modification of Record. If any difference arises as to whether the record on appeal truly discloses what occurred in the District Court or if anything material to either party is omitted from the record on appeal, the District Court may on motion or suggestion, after appropriate notice to the parties, supplement the record to correct the omission or misstatement or the Superior Court may on motion or suggestion or on its own initiative, direct that a supplemental record be transmitted by the District Court clerk. All other questions as to content and form of the record shall be presented to the Superior Court.

(j) Dismissal of Appeal.

(1) *Voluntary Dismissal by the Appellant*. The appellant may dismiss his or her appeal by filing a written dismissal signed by the appellant; provided that, on or after the date scheduled for argument or submission on briefs, it may be dismissed only with leave of the Superior Court.

(2) *By Stipulation*. The appeal may be dismissed by stipulation entered into by the parties and filed with the clerk of the Superior Court, provided that on or after the date scheduled for argument or submission on briefs, it may be dismissed only with the leave of the Superior Court.

(3) *Failure to Comply*. If either party fails to comply with the provisions of this Rule or Rule 36A within the times prescribed therein, a justice of the Superior Court may on motion of either party or on its own initiative, impose such sanctions as the justice deems appropriate, including involuntary dismissal of the appeal and refusal to permit one or both parties to present oral argument.

(4) *For Lack of Jurisdiction*. Whenever it appears by suggestion of the parties or otherwise that the Superior Court lacks jurisdiction of the subject matter, the Superior Court shall dismiss the appeal.

Advisory Committee Note—1989

[M.R. Crim. P. 36.] Rules 93 and 94 (Part XIII), dealing with appeals to the Superior Court, have been transferred to that part of the rules (VII) dealing with appeals, where they more properly belong. The new rules dealing with appeals to the Superior Court contain the substance of former Rules 93 and 94 and former District Court Rules 37, 37A, 38 and 39.

Rule 36(a) has been taken from District Court Rule 37(a). Former Rule 93(b), with slight modification, has been transferred to new Rule 36(b). Rule 36(c) is taken from and is the same as Rule 37(c). Rules 36(d) and (e) incorporate the provisions of Rules 37B and 38 relating to appeals by the state and stay of execution.

Former Rule 36, dealing with clerical mistakes, has been transferred to Rule 50.

Advisory Committee Notes—2000

[M.R. Crim. P. 36(a).] This amendment does three things. First, it requires that the notice of appeal conform to "form number CR-166 prepared by the Judicial Branch Forms Committee" since the Appendix of District Court Forms is abrogated. *See* Advisory Committee Note to M.R. Crim. P. 1(d). Second, it brings subdivision (a) in conformity with the Supreme Judicial Court's "Administrative Order: Mandatory use of Transcript Order Form," effective October 15, 1997. *See* Me. Rptr. 699-709 A.2d CL. Third, it eliminates the current requirement that the docket entries transmitted from the District Court to the Superior Court be "certified" in view of the recent automation of court records.

Advisory Committee Notes—2001

[M.R. Crim. P. 36.] *See* Advisory Committee Note to M.R. Crim. P. 35(f).

Advisory Committee Note—2002

[M.R. Crim. P. 36(a).] The amendment corrects a typographical error.

[M.R. Crim. P. 36(c).] The amendment conforms the time for appeal and the extension of time with M.R. App. P. 2(b)(2) and (5).

[M.R. Crim. P. 36(f).] The amendment conforms the time to prepare and file a transcript with M.R. App. P. 6(c).

[M.R. Crim. P. 36(g).] The amendment conforms the time requirements as to a statement in lieu of a transcript with M.R. App. P. 5(d). In addition, the amendment clarifies that any objection or proposed amendments to the statement by appellee's counsel must be submitted to the court for settlement and approval along with the statement prepared by appellant's counsel. Finally, the amendment makes one formalistic change.

[M.R. Crim. P. 36(h).] The amendment makes a formalistic change to the heading to conform it to that of M.R. App. P. 5(e).

Advisory Committee Note—2003

[M.R. Crim. P. 36(d).] The amendment conforms subdivision (d) to both Rule 2 of the Maine Rules of Appellate Procedure and Administrative Order—Mandatory Use of Transcript Order Form (added effective October 15, 1997).

[M.R. Crim. P. 36(e).] The amendment conforms subdivision (e) to Rule 3 of the Maine Rules of Appellate Procedure.

[M.R. Crim. P. 36(f).] The amendment adds a new subdivision (f) that is modeled after Rule 3 (b) of the Maine Rules of Appellate Procedure. The new subdivision contains the limiting language "when permitted by statute" relative to the District Court's authority to fix or revoke bail pending appeal since the setting of bail pending appeal following a revocation of probation is not authorized by statute. *See generally* 15 M.R.S. § 1004 and 17-A M.R.S. §§ 1206 and 1207.

[M.R. Crim. P. 36(f) and (g).] The amendment does five things. First, it redesignates current subdivision (f) as subdivision (g) and redesignates current subdivision (g) as subdivision (h). Second, it amends subdivision (g), as redesignated, by identifying the receipt of the "transcript order" rather than the "notice of appeal" as the triggering event for the running of the normal 56-day period within which the Electronic Recording Division must prepare and file the designated transcript. Third, it corrects a typographical error in the second paragraph of subdivision (g), as redesignated, by replacing the word "the" with the word "due." Fourth, it amends subdivision (h), as redesignated, in paragraph 3 by replacing the reference to subdivision "(f)" with "(g)." Fifth, it changes the time for submitting a statement of the evidence under subdivision (h)(2) to 28 days from the present 30 days to recognize the current practice of calculating appeal time limits in 7 day units.

[M.R. Crim. P. 36(h) and (i).] The amendment does two things. First, it redesignates current subdivision (h) as subdivision (i) and redesignates current subdivision (i) as subdivision (j). Second, it makes a number of changes to subdivision (j), as redesignated, in order to conform it with Rule 4 of the Maine Rules of Appellate Procedure.

Advisory Committee Note—2004

[M.R. Crim. P. 36(a), (b), (d), (e) and (g) and heading.] These amendments do three things. First, they add to the rule two additional appeals to the Superior Court by a defendant—namely, an appeal from a revocation of supervised release ruling in a revocation of supervised release proceeding in the District Court pursuant to 17-A M.R.S. § 1233, and, an appeal from a revocation of administrative release ruling in a revocation of administrative release proceeding in the District Court pursuant to 17-A M.R.S. § 1349-F. The appeal from a

revocation of supervised release ruling was enacted as part of Chapter 50 [§§ 1231-1233] of Title 17-A by P.L. 1999, ch. 788, § 7. The appeal from a revocation of administrative release ruling was enacted as part of chapter 54-G [§§ 1349 to 1349–F] of Title 17-A by P.L. 2004, ch. 711, § A-19. Second, these amendments replace the word "order" with the word "ruling" in order to bring Rule 36 into conformity with Rule 19 of the Maine Rules of Appellate Procedure. *See also* Advisory Committee Note to M.R. Crim. P. 35 (f) and (g). Third, and finally, these amendments make a number of formalistic changes.

Advisory Committee Note – June 2005

[M.R. Crim. P. 36 heading and (a) and (b).] The amendment adds to the list of appeals or petitions from an aggrieved defendant in the District Court to the Superior Court an appeal from the denial of a petition seeking to be declared indigent for purposes of assignment of counsel on appeal or from the granting of a conditional order, pursuant to 15 M.R.S. § 2111 (2003) and Rule 44A(c). This appeal was unintentionally omitted when Rule 36 was recently amended, effective August 1, 2004. *See* Me. Rptr., 846-861 A.2d XXVI-XXVIII. The time for taking this appeal and the procedure to be followed in pursuing it are as provided in Rule 44A(c).

Advisory Note—July 2010

M.R. Crim. P. 36(f). *See* Advisory Note—July 2010 to M.R.Crim.P. 44.

Advisory Note – July 2012

This amendment replaces "Electronic Recording Division" with the current title of the office: "Office of Transcript Production."

RULE 36A. RECORD ON APPEAL TO THE SUPERIOR COURT BY A DEFENDANT FROM AN ADVERSE RULING OF THE DISTRICT COURT UNDER RULE 35(a) OR (c), A REVOCATION OF PROBATION RULING, A REVOCATION OF SUPERVISED RELEASE RULING OR A REVOCATION OF ADMINISTRATIVE RELEASE RULING

(a) Contents of Appeal Record.

(1) *Contents of Rule 35 Appeal Record*. The Rule 35 appeal record shall consist of the following: a copy of all docket entries; the original of the notice of

appeal with the date of the filing; all original papers relating to the Rule 35 proceeding including the motion for correction or reduction, any exhibits offered to or considered by the District Court, and the adverse order; the original of any supplemental material or of any new transcript, other than of the Rule 35 hearing, earlier supplied or to be supplied to the Superior Court pursuant to Rule 36(h); and, if authorized by the Superior Court pursuant to subdivision (b) and (c), the original of the transcript of all or a portion of the sentencing proceeding, of the trial proceeding or, in the case involving the acceptance of a plea, of the Rule 11 proceeding.

(2) *Contents of the Section 1207, Section 1233 or Section 1349-F Appeal Record.* The record on appeal in an appeal to the Superior Court by a person whose probation is revoked in the District Court pursuant to 17-A M.R.S. § 1207, whose supervised release is revoked pursuant to 17-A M.R.S. § 1233 or whose administrative release is revoked pursuant to 17-A M.R.S. § 1349-F, shall consist of the following: a copy of all docket entries; all original papers relating to the revocation proceeding including the motion for revocation, any exhibits offered to or considered by the District Court, the adverse order and the notice of appeal with the date of the filing; the original of the transcript of the revocation proceeding; the original of any supplemental material or any new transcript, other than of the transcript of the revocation proceeding, earlier supplied or to be supplied to the Superior Court pursuant to Rule 36(i); and, if authorized by the Superior Court pursuant to subdivision (b) and (c), the original of the transcript of all or portion of the sentencing proceeding.

(b) Requesting Preparation of Transcript.

(1) *Requesting Preparation of Trial, Rule 11 or Sentencing Transcript by a Party*. Unless already a part of the Rule 35 appeal record by virtue of Rule 36(h), the appellant may within 7 days of filing the notice of appeal, file with the clerk of the Superior Court and serve upon opposing counsel and the Office of Transcript Production of the Judicial Branch, a motion seeking permission from the Superior Court to include in the Rule 35 appeal record all or a portion of the sentencing proceeding, of the trial proceeding or, in a case involving the acceptance of a plea, of the Rule 11 proceeding. Within 7 days of receipt of this motion, opposing counsel may, in like manner, seek to include additional portions not earlier designated.

(2) *Requesting Preparation of Sentencing Transcript by a Party.* Unless already part of the section 1207, section 1233 or section 1349-F appeal record by

virtue of Rule 36(i), the appellant may within 7 days of filing the notice of appeal, file with the clerk of the Superior Court and serve upon opposing counsel and the Office of Transcript Production of the Judicial Branch, a motion seeking permission from the Superior Court to include within the section 1207, section 1233 or section 1349-F appeal record all or a portion of the sentencing proceeding. Within 7 days of receipt of this motion, opposing counsel may, in like manner, seek to include additional portions not earlier designated.

(c) Duty of Office of Transcript Production of the Judicial Branch to Prepare and File Transcript(s). The clerk of Superior Court shall forthwith send to the parties and to the Office of Transcript Production of the Judicial Branch a date-stamped copy of the Superior Court order making the final disposition of the motion or motions filed pursuant to subdivision (b). If the disposition by the Superior Court authorizes preparation, unless the Superior Court otherwise directs, within 56 days of receipt of the date-stamped copy of the order the Office of Transcript Production of the Judicial Branch shall file the transcript with the clerk of the District Court and furnish copies to the parties. If the Office of Transcript Production of the Judicial Branch anticipates that the 56-day limit will not be met, the Office of Transcript Production shall make application for an extension as provided in Rule 36(g).

In the case of an indigent defendant, the Office of Transcript Production of the Judicial Branch shall be compensated out of Maine Commission on Indigent Legal Services funds. A nonindigent defendant shall make satisfactory financial arrangements with the Office of Transcript Production or its agent within 7 days after receipt of the date-stamped copy of the Superior Court's order granting his or her motion requesting preparation of all or a portion of a sentencing, trial or Rule 11 transcript.

(d) Clerk's Responsibilities as to the Appeal Record.

(1) *Clerk's Responsibilities as to Rule 35 Appeal Record.*

(A) Subdivision (a), Paragraph (1) Materials Except for any Transcripts. Within 21 days of the filing of the notice of appeal by the appellant the clerk of the District Court shall file with the clerk of the Superior Court the contents of the Rule 35 appeal record under subdivision (a), paragraph (1), with the exception of any transcripts, and furnish copies to the parties. A defendant shall pay for a copy at a rate to be set by the Chief Justice of the Supreme Judicial Court. An indigent defendant who wishes to obtain a copy must file a request for the copy along with

a request that it be paid for by funds from the Maine Commission on Indigent Legal Services.

(B) Transcripts. Following receipt of the original of the transcript of the hearing relative to the Rule 35 motion, if any, the clerk of the District Court shall forthwith transmit it, along with the original of other previously filed transcript, if any, that is part of the Rule 35 appeal record, to the clerk of the Superior Court. Thereafter, following the filing of any additional transcript by the Office of Transcript Production of the Judicial Branch that is part of the Rule 35 appeal record, the clerk shall forthwith transmit the original to the clerk of Superior Court.

(C) Notice by the Clerk of the Superior Court to the Parties. Upon docketing of all of the documents and transcripts making up the Rule 35 appeal record, the clerk of the Superior Court shall send forthwith to each counsel of record a written notice showing the date on which the appellant's and the appellee's briefs are to be filed, the date on which the appellant's reply brief, if any, is due to be filed and the date on which the case will be in order for oral argument.

(2) *Clerk's Responsibilities as to the Section 1207, Section 1233 or Section 1349-F Appeal Record.*

(A) Subdivision (a), Paragraph (2), Materials Except for any Transcripts. Within 21 days of the filing of the notice of appeal by the appellant the clerk of the District Court shall file with the clerk of the Superior Court the contents of the section 1207, section 1233 or section 1349-F appeal record under subdivision (a), paragraph (2), with the exception of any transcripts, and furnish copies to the parties. A defendant shall pay for a copy at a rate to be set by the Chief Justice of the Supreme Judicial Court. An indigent defendant who wishes to obtain a copy must file a request for the copy along with a request that it be paid for by funds from the Maine Commission on Indigent Legal Services.

(B) Transcripts. Following receipt of the originals of the transcript of the hearing relative to the section 1207, section 1233 or section 1349-F motion, if any, the clerk of the District Court shall forthwith transmit it, along with the original of other previously filed transcripts, if any, that is part of the section 1207, section 1233 or section 1349-F appeal record, to the clerk of the Superior Court. Thereafter, following the filing of any additional transcript by the Office of Transcript Production of the Judicial Branch that is part of the section 1207,

section 1233 or section 1349-F appeal record, the clerk shall forthwith transmit the original to the clerk of Superior Court.

(C) Notice by the Clerk of the Superior Court to the Parties. Upon docketing of all the documents and transcripts making up the section 1207, section 1233 or section 1349-F appeal record, the clerk of the Superior Court shall send forthwith to each counsel of record a written notice showing the date on which the appellant's and the appellee's briefs are to be filed, the date on which the appellant's reply brief, if any, is due to be filed and the date on which the case will be in order for oral argument.

Advisory Committee Note—1989

[M.R. Crim. P. 36A.] New Rule 36A contains the provisions of former Rule 93 relating to the record on appeal in the Superior Court in criminal cases, and District Court Rule 39. Former Rule 93(b) is transferred with slight modification to new Rule 36A(a). Rule 36A(b) contains the language of District Court Rule 39(b). Rule 36A(c) contains the language of District Court Rule 39(c). Rule 36A(d) contains, with slight modification, the language of paragraphs 2 and 3 of Rule 93(c). Rule 36A(e) reflects the language of District Court Rule 39(e). The provisions of new Rule 36A(f) reflect those of former Rule 93(g).

Advisory Committee Note—1996

[M.R. Crim. P. 36A(d).] The amendment enlarges the current standard 40-day time period for the filing of the transcript by the Electronic Recording Division of the District Court to a 60-day time period. The additional 20 days is needed given the current volume of transcript requests. It further conforms the substance of this subdivision with that of M.R. Crim. P. 36C(d).

Advisory Committee Notes—2001

[M.R. Crim. P. 36A.] *See* Advisory Committee Note to M.R. Crim. P. 35(f).

Advisory Committee Note—2002

[M.R. Crim. P. 36A(b).] The amendment conforms the time requirements for requesting preparation of transcripts by the parties with M.R. App. P. 5(b).

[M.R. Crim. P. 36A(c).] The amendment conforms the time to prepare and file a transcript with M.R. App. P. 6(c). The amendment also conforms the time within which a nonindigent defendant must make satisfactory financial arrangements with M.R. App. P. 5(b).

Advisory Committee Note—2004

[M.R. Crim. P. 36A(a)(2), (b)(2), (d)(2) and heading.] This amendment does two things. First, it corrects three incorrect references to Rule 36. Second, it adds a revocation of supervised release in the District Court, pursuant to 17-A M.R.S. § 1233, and a revocation of administrative release in the District Court, pursuant to 17-A M.R.S. § 1349-F. *See* Advisory Committee Note to M.R. Crim. P. 36(a), (b), (d) and (g).

Advisory Note—July 2012

The second paragraph of Rule 36A(c) addresses financial responsibility for transcript production. Upon the establishment of the Maine Commission on Indigent Legal Services, the funds allocated for the representation of indigent persons were transferred from the Judicial Branch to the Maine Commission on Indigent Legal Services. This amendment clarifies that transcripts produced for those indigent parties represented by court appointed or court assigned counsel are to be paid for by the Maine Commission on Indigent Services.

This amendment also replaces "Electronic Recording Division" with the current title of the office: "Office of Transcript Production."

RULE 36B. APPEAL TO THE SUPERIOR COURT IN JUVENILE CASES

(a) Appeal to the Superior Court. An appeal may be taken by a juvenile or a juvenile's parents, guardian, or legal custodian as provided in 15 M.R.S. § 3402(1) and (2), from an adjudication, an order of disposition or modification thereof, a detention order, or refusal to modify a detention order, and, subject to the limitations stated in 15 M.R.S. § 3311-D, from a finding of failure to comply with a deferred disposition order, to the Superior Court in the county in which the juvenile crime was committed. An appeal may be taken by the State, pursuant to 15 M.R.S. § 3402(3), from the failure of a juvenile court to order a bind-over.

An appeal is taken by filing a notice of appeal with the clerk of the District Court. The notice of appeal shall conform to the appropriate form prepared by the Judicial Branch Forms Committee. The appellant shall file with the notice of appeal an order for those portions of the transcript the appellant intends to include in the record on appeal utilizing the appropriate Judicial Branch form. The clerk of the District Court shall transmit date-stamped copies of the notice of appeal and transcript order to the Office of Transcript Production of the Judicial Branch, the clerk of the Superior Court, and the appellee. The clerk of the District Court shall also transmit a copy of the docket entries to the clerk of the Superior Court. If the appellant orders less than the entire transcript of proceedings, the appellee shall have 7 days in which to order additional portions of the transcript utilizing the appropriate Judicial Branch form.

(b) Scope of Review. Review by the Superior Court shall be for error of law or abuse of discretion, as determined from the record on appeal; provided however, that pursuant to 15 M.R.S. § 3311-D, a juvenile determined to have inexcusably failed to comply with a court-imposed deferred disposition requirement may not appeal as of right and may have the merits of the appeal considered by the Superior Court only after the Superior Court has made a preliminary determination that (1) the appeal presents a significant issue of fact or law, or (2) consideration of the merits of the appeal would serve the interests of justice.

The Superior Court may affirm, reverse, or modify any order of the juvenile court, may enter a new order of disposition, or may remand for further proceedings in the juvenile court.

Pending appeal of an adjudication or an order of disposition, the Superior Court may order a stay of execution and release pending appeal.

(c) Time for Taking Appeal. An appeal may be taken within 7 days after entry of an order of disposition or other appealed order. Upon a showing of good cause, the court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed in accordance with Rule 2(b)(5) of the Maine Rules of Appellate Procedure.

(d) Stay Pending Appeal. An appeal of a detention order shall not stay proceedings in the juvenile court. Pending an appeal from an adjudication or an order of disposition, the juvenile court may order a stay of execution and release pending appeal.

Advisory Committee Note—1989

[M.R. Crim. P. 36B.] Rule 36B(a) contains the language of former District Court Rule 37A(a).

Former Rule 94(a) is transferred to new Rule 36B(b).

Rule 36B(c) is taken from District Court Rule 37A(b).

Rule 36B(d) contains the language of District Court Rule 37A(c).

Advisory Committee Notes—1999

[M.R. Crim. P. 36B.] This amendment eliminates references to "a bind-over order" because an intermediate appeal to the Superior Court by or on behalf of a juvenile from a bind-over order under 15 M.R.S. § 3402(1)(C) has been repealed by the 118th Legislature. PL 1997, c. 645, § 12. This amendment also corrects an incorrect statutory reference to the Maine Juvenile Code.

Advisory Committee Notes—2000

[M.R. Crim. P. 36B(a).] This amendment does three things. First, it requires that the notice of appeal conform to "form number JV-012 prepared by the Judicial Branch Forms Committee." Second, it brings subdivision (a) into conformity with the Supreme Judicial Court's "Administrative Order: Mandatory use of Transcript Order Form," effective October 15, 1997. *See* Me. Rptr. 699-709 A.2d CL. Third, it eliminates the current requirement that the docket entries transmitted from the District Court to the Superior Court be "certified" in view of the recent automation of court records.

Advisory Committee Note—2002

[M.R. Crim. P. 36B(a).] The amendment conforms the time the appellee has in which to order additional portions of the transcript with M.R. App. P. 5(b).

Advisory Committee Note—2003

[M.R. Crim. P. 36B(a).] The amendment replaces the term "offense" with the term "juvenile crime." The purpose of this nonsubstantive change is to substitute the applicable terminology of the Juvenile Code for the less specific term "offense." *See* 15 M.R.S. §§ 3003(16) and 3103 (2003).

Advisory Note – November 2011

The Legislature enacted P.L. 2011, ch. 384, effective September 28, 2011 adopting several amendments to the juvenile code, particularly to 15 M.R.S. §§ 3311-A, 3311-B, and 3311-C, to authorize deferred dispositions in juvenile cases, basically employing the same practices as are currently applied to deferred dispositions in adult criminal cases. Pursuant to 15 M.R.S. § 3311-D, a juvenile is given the capacity to appeal to the Superior Court from a finding of a failure to comply with a deferred dispositional requirement and imposition of a dispositional alternative. As with appeals from findings of failure to comply with deferred disposition requirements in adult criminal cases, *see* M.R. App. P. 19, section 3311-D provides that this appeal to the Superior Court is "not as of right."

The amendments to Rule 36B(a) and (b) are designed to integrate the discretionary appeal provision of the new law into the appellate review process of the Superior Court. Subdivision (b) contains two factors that the reviewing court must consider in deciding whether to reach the merits of the appeal: that the appeal presents a significant issue of fact or law, and that consideration on the merits would serve the interests of justice.

Finally, the words "pursuant to 15 M.R.S. § 3402(3)" have been added to Rule 36B(a) to identify the statutory basis for the right of the State to appeal from the failure of the juvenile court to order a bind-over.

Advisory Note – July 2012

This amendment to the second paragraph of Rule 36B(a) replaces the "District Court" with "Judicial Branch" and replaces "Electronic Recording Division" with the current title of the office: "Office of Transcript Production."

Advisory Note – December 2013

The amendment modifies Rule 36B, subdivision (c) in two respects.

First, it changes the period of time within which a juvenile may take an appeal from the juvenile court to the Superior Court from 5 days to 7 days after the entry of an order of disposition or other appealed order in response to the statutory change made to 15 M.R.S. § 3402(5) by P.L. 2013, ch. 234, § 11, effective October 9, 2013.

Second, in light of Rule 2(b)(5) of the Maine Rules of Appellate Procedure it eliminates "excusable neglect" as the criterion for an extension of time in favor of a "showing of good cause" and the extension periods therein provided.

RULE 36C. RECORD ON APPEAL IN JUVENILE CASES

(a) Contents of Record. The record on appeal shall consist of the juvenile court clerk's record and either the transcript of proceedings in the juvenile court, or by order of the Superior court, the untranscribed sound recording or a statement in lieu of transcript prepared pursuant to Rule 36(g).

(b) Contents of Juvenile Court Clerk's Record. The juvenile court clerk's record shall include a copy of the docket entries and the originals of the petition, the order of disposition or other order appealed from, all motions and actions thereon, any findings of fact, all documentary exhibits, and a list of all retained exhibits.

Documentary exhibits include papers, maps, photographs, diagrams, and other similar materials. If a documentary exhibit can be easily and inexpensively reproduced, a copy thereof shall be retained by the clerk of the juvenile court. If a documentary exhibit is of unusual bulk or weight, it shall be retained by the clerk of the juvenile court, except upon order of the Superior Court.

Exhibits which consist of tangible objects, such as weapons or articles of clothing, shall be retained by the clerk of the juvenile court, except upon order of the Superior Court.

(c) Filing of Juvenile Court Clerk's Record. The clerk of the District Court shall file the juvenile court clerk's record with the clerk of the Superior Court within 21 days of the filing of the notice of appeal and furnish copies to the parties. It shall be the appellant's responsibility to ensure that these time limits are met and to provide the clerk such assistance as is necessary in preparing the record

for filing in the Superior Court. Upon a showing of good cause the Superior Court may increase or decrease the time allowed for filing the record.

(d) Filing of Transcript. The Office of Transcript Production of the Judicial Branch shall file the transcript of proceedings with the clerk of the Superior Court and furnish copies to the parties within 56 days of the filing of the notice of appeal. If the Office of Transcript Production of the Judicial Branch anticipates that it will be unable to meet the 56-day time limit, it shall file an application with the Superior Court requesting additional time at least 5 days before the expiration of the 56-day time limit. The Superior Court shall have discretion to grant reasonable enlargements of time. Notwithstanding this or any other provision of these rules, the party requesting the transcript shall exercise due diligence to assure its timely filing.

(e) Motion to Dispense With Transcript. The appellant may move pursuant to 15 M.R.S. § 3405(2) to substitute the untranscribed sound recording or an agreed or settled statement of facts for the transcript of the proceedings in the juvenile court. In the event the Superior Court, in the interest of justice, orders such substitution, the clerk of the Superior Court shall transmit copies of the order to the clerk of the District Court and to the Office of Transcript Production. A statement in lieu of transcript shall be prepared pursuant to Rule 36(g) and shall be approved by the juvenile court. A statement shall be filed with the clerk of the Superior Court within the time provided for the filing of a transcript. An untranscribed sound recording shall be provided to the clerk of the Superior Court forthwith.

(f) Notice by Clerk of the Superior Court. Upon docketing the record on appeal, the clerk of the Superior court shall send forthwith to each counsel of record a written notice showing the dates on which the appellant's and the appellee's briefs are due to be filed and the date on which the case will be in order for oral argument.

(g) Failure to Comply With Rule. If either party fails to comply with this rule, a justice of the Superior Court may impose such sanctions as the justice deems appropriate, including dismissal of an appeal and refusal to permit one of both parties to present oral argument.

Advisory Committee Note—1989

[M.R. Crim. P. 36C.] Rule 36C governs the contents of the record on appeal to the Superior Court in juvenile cases.

Rule 36C(a) is drawn, with slight modification, from former District Court Rule 37A(d).

Former District Court Rules 37A(e) and (f) are transferred to Rules 36C(b) and (c), respectively. Rule 36C(d) is drawn, with slight modification, from former District Court Rule 37A(g) and Rule 94(c). Rule 36C(e) is essentially the same as former Rule 94(d). Rule 36C(f) is new and conforms to the equivalent provision in Rule 36A(f).

Advisory Committee Note—1996

[M.R. Crim. P. 36C(d).] *See* Advisory Committee Note to M.R. Crim. P. 36A(d).

Advisory Committee Notes—2001

[M.R. Crim. P. 36C.] Although juvenile appeals remain unaffected by P.L. 1999, chapter 731, Part ZZZ, because the substance of Rule 36A(e) is now found in Rule 36(g), Rule 36C has been amended to reflect that change. In addition, Rule 36C has been amended to reflect that the name of the entity electronically recording proceedings has been changed from the "Electronic Recording Division of the District Court" to the "Electronic Recording Division of the Judicial Branch." *See also* Rules 36, 36A and 37. Further, a new subdivision (f) has been added relating to notice to the parties by the clerk as to the dates for the filing of briefs and that date on which the case will be in order for oral argument to conform it to Rule 36A(d)(1)(C) and (2)(C). Previously the substance of new subdivision (f) was found in Rule 36D(a). Finally, the substance of former subdivision (f) is now in new subdivision (g).

Advisory Committee Note—2002

[M.R. Crim. P. 36C(d).] *See* Advisory Committee Note to M.R. Crim. P. 36(f).

Advisory Note – June 2006

M.R. Crim. P. 36C(d). The amendment replaces the spelled-out number "five" with "5." *See* Advisory Note to M.R. Crim. P. 6(a) and (b)(2).

Advisory Note—July 2012

This amendment to Rule 36C(d) and (e) replaces the "District Court" with "Judicial Branch" and replaces "Electronic Recording Division" with the current title of the office: "Office of Transcript Production."

RULE 36D. BRIEFS AND ORAL ARGUMENT IN THE SUPERIOR COURT

(a) Time for Filing Briefs. The appellant's brief shall be filed within 35 days after the date on which the clerk of the Superior Court mails notice of the docketing of the record on appeal. The appellee's brief shall be filed within 28 days after service of the brief of the appellant; and the appellant may file a reply brief within 14 days after service of the brief of the appellee. Upon showing of good cause, the Superior Court may increase or decrease the time limits specified in this subdivision.

If an appellant fails to comply with this subdivision, the Superior Court may dismiss the appeal for want of prosecution. If an appellee fails to comply, the appellee will not be heard at oral argument except by permission of the Superior Court.

(b) Scheduling of Oral Argument. All appeals shall be in order for oral argument 14 days after the date on which appellee's brief is due or is filed, whichever is earlier. The clerk of the Superior Court shall schedule oral argument for the first appropriate date after the appeal is in order for hearing, and shall notify each counsel of record of the time and place at which oral argument will be heard. The parties may, by agreement, waive argument and submit the matter for decision on the record and the briefs.

(c) Failure to Comply With Rule. If either party fails to comply with this rule, a justice of the Superior Court may impose such sanctions as the justice deems appropriate, including dismissal of an appeal and refusal to permit one or both parties to present oral argument.

Advisory Committee Note—1989

[M.R. Crim. P. 36D.] Rule 36D is based on former Rules 93(d), (e), (f) and (g).

Advisory Committee Note—1995

[M.R. Crim. P. 36D(b).] The amendment corrects a typographical error.

Advisory Committee Notes—2001

[M.R. Crim. P. 36D.] *See* Advisory Committee Notes to M.R. Crim. P. 36C.

Advisory Committee Note—2002

[M.R. Crim. P. 36D(a).] The amendment conforms the time for filing briefs by the parties with M.R. App. P. 7(b).

[M.R. Crim. P. 36D(b).] The amendment conforms the time in which an appeal is in order for oral argument with M.R. App. P. 7(e).

RULES 37 TO 37B. [ABROGATED]

Advisory Committee Notes—2000

[M.R. Crim. P. 37(b).] This amendment, apart from making certain formalistic changes, brings subdivision (b) into conformity with the Supreme Judicial Court's "Administrative Order: Mandatory use of Transcript Order Form," effective October 15, 1997. *See* Me. Rptr. 699-709 A.2d CL. It additionally allows the appellee 5 days within which to order additional portions of a transcript in the event the appellant orders less than the entire transcript of the proceeding.

[M.R. Crim. P. 37(d).] This amendment eliminates the current requirement that the docket entries transmitted from the Superior Court to the Law Court be "certified" in view of the recent automation of court records.

Advisory Notes—2001

[M.R. Crim. P. 37 to 37B.] Section 1 [of Supreme Judicial Court order] addresses the current rules in the Maine Rules of Civil Procedure, the Maine Rules of Criminal Procedure and the Maine Rules of Probate Procedure governing appeals to the Law Court. It adds a provision to each of those rules noting that they are limited to appeals filed on or before December 31, 2000. It also provides a reference to the Maine Rules of Appellate Procedure for appeals filed on or after

January 1, 2001. The quoted language may appear directly in the rule or by reference such as: "See limitation on applicability preceding the text of Rule 72."

Separately, section 1(d) abolishes or abrogates each of the listed rules, effective December 31, 2001. By that time, any appeals filed before December 31, 2000, should be sufficiently processed that there is no further need for the appeal rules within the individual rules.

RULES 37C TO 37H. [ABROGATED]

Advisory Committee Notes—2002

[M.R. Crim. P. 37C to 37H.] The rules listed in the above section of the rules amendments, Rules 37C, 37D, 37E, 37F, 37G, 37H, 40, 40A, 76, 77, 88 and 89 of the Maine Rules of Criminal Procedure are abrogated, effective January 1, 2002. These rules are the remaining rules covering discretionary appeals that are now replaced by M.R. App. 19 and 20. Other provisions of the Discretionary Appeal Rules have already been abrogated, effective December 31, 2001 by the rule making orders adopted December 14, 2000 and effective January 1, 2001.

RULE 38. STAY OF EXECUTION OF SENTENCE

(a) Sentence Involving Imprisonment, Probation or Administrative Release. Any portion of a sentence involving imprisonment, probation or administrative release shall be stayed if an appeal is taken and the defendant is admitted to bail pending appeal. A court may not under any circumstances place the defendant in execution of a probationary period or period of administrative release while on bail pending appeal.

(b) Sentence Involving Alternatives Other than Imprisonment, Probation or Administrative Release. Any portion of a sentence involving a sentence alternative other than imprisonment, probation or administrative release shall be stayed by the court upon request of the defendant if an appeal is taken and if the defendant is admitted to bail pending appeal. If the defendant takes an appeal and does not or cannot seek bail pending appeal or is unable to meet the bail that is set, the court upon request of the defendant may stay any portion of a sentence involving money and may stay any other sentence alternative on any terms considered appropriate. If the judgment is vacated and the stayed sentence alternative involves money, the clerk shall forthwith refund to the defendant, or to such person as the defendant shall direct, any funds deposited to cover the

defendant's money alternative. If the judgment is affirmed, the funds so deposited shall be applied by the clerk in payment of the money alternative. The clerk shall forthwith notify the defendant that such application has been made and, when applicable, the money alternative paid in full.

(c) Automatic Termination of Stay. If a judgment is affirmed on appeal, a court-ordered stay under subdivision (a) or (b) automatically terminates when the mandate of the appellate court is entered in the criminal docket of the trial court.

(d) Surrender of Defendant Following Automatic Termination of Stay. When a stay of a sentence of imprisonment automatically terminates pursuant to subdivision (c), the clerk of the trial court shall forthwith mail a date-stamped copy of the mandate to the parties and to the sheriff named in the commitment order. Within 3 days after that mailing, excluding Saturdays, Sundays and legal holidays, the defendant's appellate counsel or, if not represented by counsel on appeal, the defendant shall contact the office of the sheriff named in the commitment order and make arrangements satisfactory to the sheriff for surrendering into that sheriff's custody that day or, at the direction of the sheriff, the next regular business day. If such arrangements are not timely made, or if the arrangements are not complied with, upon the request of the named sheriff or the attorney for the State, or by direction of the court, the clerk shall issue a warrant for the defendant's arrest. Upon issuance of that warrant and necessary notice by the clerk to the court of that fact, the court, in conformity with Rule 46(f)(1), shall declare a forfeiture of the post-conviction bail because of the breach of condition.

Advisory Committee Note—1975

[M.R. Crim. P. 38(a)(1).] The change in this rule is to eliminate any confusion resulting from 15 M.R.S. § 1701-A (Maine Laws 1973, chapter 144). The language deleted was originally included in the rule following the federal practice; its purpose in federal practice is to make certain that a defendant will be available to his counsel pending appeal, even though he is not admitted to bail, by having him confined during the pendency of the appeal close to his counsel. With federal institutions all over the country this is of great importance in federal procedure. It is of less importance in Maine practice and the amendment is necessary to eliminate claims presently being made by some defendants that they have an absolute right to serve a state prison sentence in the county jail by exercising an election under 38(a)(1) as it is presently worded.

Advisory Committee Note—1979

[M.R. Crim. P. 38.] Provisions of Rule 38 dealing with bail pending appeal are transferred to the Bail Rule, Rule 46. See amendment to Rule 46(a).

Advisory Committee Note—1989

[M.R. Crim. P. 38.] Several changes are made in Rule 38. Rule 38(a) consolidates the provisions of former Rules 38(a) and (c) relating to stay of sentences of imprisonment or probation if an appeal is taken and the defendant is admitted to bail pending appeal. The wording of Rule 38(b) is changed to reflect that sentences can be imposed involving monetary alternatives other than a fine or a fine and costs. Examples are sentences for costs or for restitution. The terms "sentence involving money" and "money alternative" are intended to include these additional sentences.

Advisory Committee Note—1994

[M.R. Crim. P. 38(a).] Some question has arisen as to the precise point in time a stay of execution of sentence automatically terminates once an appeal is denied. The amendment resolves any ambiguity by identifying that point in time as being the date the mandate of the appellate court (normally the Law Court but, in appeals from the district court by a defendant, the Superior Court sitting as an intermediate appellate court) is entered in the criminal docket of the trial court.

[M.R. Crim. P. 38(c).] New Rule 38(c) establishes for the first time in the Rules of Criminal Procedure a fair and orderly procedure for the surrender of a defendant whose appeal has been denied. This procedure places the onus on a defendant to arrange for his or her own surrender into custody. However, it does not prevent the attorney for the state from independently arranging for the defendant's seizure by moving to revoke bail in unusual cases, e.g., where there is a risk of flight.

Advisory Committee Notes—1999

[M.R. Crim. P. 38(a).] This amendment addresses a latent ambiguity created in 1989 with the consolidation of former Rule 38(c) with that of former Rule 38(a) - namely, whether the 1989 amendment intended to substantively modify former Rule 38(c) by eliminating the opportunity for a defendant to elect to serve a period of probation while on bail pending appeal. See 2 Cluchey & Seitzinger, *Maine*

Criminal Practice § 38.3, n.7 at VIII-113.0 (1994). The amendment makes clear that, in addition to barring a court from doing it on its own motion, Rule 38(a) does not authorize a defendant to elect to be in execution of a probationary term while on bail pending appeal. Bail conditions may be imposed to satisfy the intent served by conditions of probation during the pendency of the appeal.

Advisory Committee Note—2003

[M.R. Crim. P. 38.] This amendment does five things. First, it changes current subdivision (b) as it relates to a defendant who, on appeal, seeks a stay from the court of that part of a sentence involving money and is not in fact admitted to bail. Currently in this circumstance the subdivision requires that a defendant deposit the whole amount of the money alternative with the clerk of court as a necessary precondition for a court to order a stay. This prerequisite has proven unworkable in many cases and thus is not consistently applied by the court. As amended, the subdivision gives to the court broad discretion to stay the money alternative portion of the sentence on any terms it views as appropriate for that defendant. In this regard, among other things, it is contemplated that a court may require the defendant to deposit all or a part of the money alternative with the clerk of court, post a bond to pay the money alternative, or submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets. The amendment to subdivision (b) is modeled after its federal rule counterpart. *See* Fed. R. Crim. P. 48(c).

Second, the amendment eliminates the current requirement that the clerk wait 30 days following the affirmation of a judgment before applying the deposited funds in payment of the money alternative. The 30-day requirement was apparently added to subdivision (b), effective June 1, 1989, when the Maine Rules of Criminal Procedure and the then Maine District Court Criminal Rules were merged. No explanation was offered for the addition of a 30-day waiting period. *See* M.R. Crim. P. 38(b) Advisory Committee's Note to 1989 amend., Me. Rptr., CXVII. It has no apparent purpose under current procedure.

Third, this amendment further amends subdivision (b) to also address a defendant who, on appeal, seeks a stay from the court of that part of the sentence not involving imprisonment, probation or money. Currently the rule does not address this form of sentence alternative that commonly involves forfeitures (e.g., 17-A M.R.S. §§ 1002-A(4) and 1158), revocation or suspension of a license or permit (e.g., 17-A M.R.S. § 1057(6) and 29-A M.R.S. § 2411(5)) or a disqualification (e.g., 17-A M.R.S. § 1153(2)).

Fourth, the amendment transfers the current second paragraph of subdivision (a) to a new subdivision (c) and broadens its application to include all court-ordered stays under the rule.

Fifth, and last, it redesignates current subdivision (c) to subdivision (d) and corrects an incorrect reference to Rule 46.

Advisory Note – June 2006

M.R. Crim. P. 38(a) and (b). The amendment treats sentencing alternatives that include a period of administrative release (17-A M.R.S. ch. 54-G) in the same manner as a sentence involving imprisonment or a period of probation. In addition to barring a court from doing it on its own motion, as amended, Rule 38(a) does not authorize a defendant to elect to be in execution of a period of administrative release while on bail pending appeal. As with a sentencing alternative involving probation, bail conditions may be imposed to satisfy the intent served by requirements of administrative release during the pendency of the appeal. *See* Me. Rptr., 716-724 A.2d LIII, LX and LXIV-LXV in the context of probation. Administrative release was added to the Maine Criminal Code in 2004 by the 121st Legislature. *See* P.L. 2004, ch. 711, § A-19.

RULES 39 TO 39D. [ABROGATED]

Advisory Committee Notes—2000

[M.R. Crim. P. 39(b).] *See* Advisory Committee Note to M.R. Crim. P. 37(b).

[M.R. Crim. P. 39(h).] *See* Advisory Committee Note to M.R. Crim. P. 37(d).

Advisory Notes—2001

[M.R. Crim. P. 39 to 39D.] Section 1 [of Supreme Judicial Court order] addresses the current rules in the Maine Rules of Civil Procedure, the Maine Rules of Criminal Procedure and the Maine Rules of Probate Procedure governing appeals to the Law Court. It adds a provision to each of those rules noting that they are limited to appeals filed on or before December 31, 2000. It also provides a reference to the Maine Rules of Appellate Procedure for appeals filed on or after

January 1, 2001. The quoted language may appear directly in the rule or by reference such as: "See limitation on applicability preceding the text of Rule 72."

Separately, section 1(d) abolishes or abrogates each of the listed rules, effective December 31, 2001. By that time, any appeals filed before December 31, 2000, should be sufficiently processed that there is no further need for the appeal rules within the individual rules.

VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

RULES 40 AND 40A. [ABROGATED]

Advisory Committee Notes—2002

[M.R. Crim. P. 40 and 40A.] The rules listed in the above section of the rules amendments, Rules 37C, 37D, 37E, 37F, 37G, 37H, 40, 40A, 76, 77, 88 and 89 of the Maine Rules of Criminal Procedure are abrogated, effective January 1, 2002. These rules are the remaining rules covering discretionary appeals that are now replaced by M.R. App. 19 and 20. Other provisions of the Discretionary Appeal Rules have already been abrogated, effective December 31, 2001 by the rule making orders adopted December 14, 2000 and effective January 1, 2001.

RULES 40B AND 40C. [ABROGATED]

Advisory Notes—2001

[M.R. Crim. P. 40B and 40C.] Section 1 [of Supreme Judicial Court order] addresses the current rules in the Maine Rules of Civil Procedure, the Maine Rules of Criminal Procedure and the Maine Rules of Probate Procedure governing appeals to the Law Court. It adds a provision to each of those rules noting that they are limited to appeals filed on or before December 31, 2000. It also provides a reference to the Maine Rules of Appellate Procedure for appeals filed on or after January 1, 2001. The quoted language may appear directly in the rule or by reference such as: "See limitation on applicability preceding the text of Rule 72."

Separately, section 1(d) abolishes or abrogates each of the listed rules, effective December 31, 2001. By that time, any appeals filed before December 31, 2000, should be sufficiently processed that there is no further need for the appeal rules within the individual rules.

RULE 41. SEARCH AND SEIZURE

(a) Scope. This rule does not modify any special statutory provision regulating search, seizure, or the issuance and execution of search warrants.

(b) Authority to Issue a Search Warrant. A search warrant may be issued by a Superior Court justice, District Court judge, or justice of the peace as authorized by law.

(c) Grounds for Issuance of a Search Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a crime; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(d) Definition of Property. The term "property" is used in this rule and in Rules 41A and 41B to include, but not be limited to, the following:

(1) Documents, books, papers, and any other tangible objects;

(2) Electronically stored information;

(3) Information derived from a tracking device;

(4) Biological materials, including hair, blood, saliva, fingernail clippings or scrapings, and materials obtainable by swab;

(5) Fingerprints, palmprints, and footprints; and

(6) Photographs, videos, or any other digital image of any person or object.

(e) Requesting a Search Warrant.

(1) *In General.* A search warrant request must be made in the presence of a Superior Court justice, District Court judge, or justice of the peace unless the justice, judge, or justice of the peace, upon request of the applicant, determines it reasonable under the circumstances to allow a search warrant request to be made outside the presence of the justice, judge, or justice of the peace.

(2) *Requesting a Search Warrant in the Presence of a Superior Court Justice, District Court Judge, or Justice of the Peace.* A search warrant request made in the presence of a Superior Court justice, District Court judge, or justice of the peace must be in the form of a written affidavit sworn to before the justice, judge, or justice of the peace. The affidavit must specifically designate the person or place to be searched or the tracking device to be installed and used, and the person or property to be searched for or tracked. Before ruling on the request, the justice, judge, or justice of the peace may hear evidence under oath or affirmation which shall be taken down by a court reporter or recording equipment, or recorded in a manner that is capable of producing a record adequate for purposes of review.

(3) *Requesting a Search Warrant Outside the Presence of a Superior Court Justice, District Court Judge, or Justice of the Peace.* A search warrant request to be made outside the presence of a Superior Court justice, District Court judge, or justice of the peace, if permitted by a justice, judge, or justice of the peace, shall be as provided by Rule 41C.

(f) Issuing a Search Warrant.

(1) *Duty of Superior Court Justice, District Court Judge, or Justice of the Peace.* If the Superior Court justice, District Court judge, or justice of the peace to whom the search warrant request is made concludes that there is probable cause to believe that the grounds for the application exist, the justice, judge, or justice of the peace shall issue a search warrant designating, except as otherwise provided in Rule 41B, the person or place to be searched, and the person or property to be searched for.

(2) *Contents of the Search Warrant.*

(A) *In General.* The search warrant shall be directed to any officer authorized to enforce or assist in enforcing any law of the State of Maine. It shall state the names of the persons whose affidavits have been taken in support thereof. Except as otherwise provided in Rule 41B, it shall command the officer to search the person or place named for the person or property specified. It shall designate the court to which it shall be returned. A copy of the search warrant shall promptly be filed with the District Court designated in the warrant.

The warrant and affidavit materials shall be treated as impounded until the return is filed.

(B) *Nighttime Search Warrant.* The warrant shall direct that it be executed between the hours of 7 a.m. and 9 p.m., unless the Superior Court justice, District Court judge, or justice of the peace, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at another time.

(C) *Unannounced Execution of Search Warrant.* The warrant may direct that it be executed by an officer without providing notice of the officer's purpose and office if the Superior Court justice, District Court judge, or justice of the peace so directs by appropriate provision in the warrant. The justice, judge, or justice of the peace may so direct in the warrant upon a finding of reasonable cause shown that:

(i) the property sought may be quickly or easily altered, destroyed, concealed, removed, or disposed of if prior notice is given;

(ii) the escape of the person sought may be facilitated if prior notice is given;

(iii) the person sought, the person from whom or from whose premises the property is sought, or an occupant thereof, may use deadly or nondeadly force in resistance to the execution of the warrant, and dispensing with prior notice is more likely to ensure the safety of officers, occupants, or others; or

(iv) such facts and circumstances exist as would render reasonable the warrant's execution without notice.

(g) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. Upon the expiration of the 10 days, the warrant must be returned to the District Court designated in the warrant. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken. If the person is not present, the officer shall leave the copy of the warrant and the receipt at the premises. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property

was taken, if the person is present, or in the presence of at least one credible person other than the applicant for the warrant. It shall be verified by the officer. Upon request the justice or judge sitting in the District Court designated in the warrant shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(h) Return of Papers to Clerk. The justice or judge sitting in the District Court to which a search warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection with the warrant and shall file them with the clerk of the District Court for the district and division in which the property was seized.

The justice or judge, upon motion or upon the justice's or judge's own motion, may for good cause order the clerk to impound some or all of the warrant materials until a specified date or event.

(i) Attorney for State to File Notice with Clerk. If a complaint, indictment or information is filed subsequent to a search, the attorney for the state must file a notice with the clerk of the court of the district in which the search took place stating the venue of the case. The clerk will transfer the search warrant to the court having jurisdiction and venue over the criminal action instituted by the complaint, indictment, or information.

(j) Motion for Return of Property. A person aggrieved by an unlawful seizure, when no charge has been filed, may move the Superior Court in the county in which the property was seized for the return of the property on the ground that it was illegally seized.

A person aggrieved by an unlawful seizure related to a pending charge may move in the court that has jurisdiction of the charge for the return of the property on the ground that it was illegally seized.

The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the court shall order that the property be restored unless otherwise subject to lawful detention. The motion may be joined with a motion to suppress evidence.

Advisory Committee Note – 1975

[M.R. Crim. P. 41(c), (d) and (f).] The changes in subdivisions (c), (d) and (f) of Rule 41 clarify the procedure on the return of search warrants. As originally drafted there was a patent ambiguity in the rule, which should be resolved. The amended rule requires that the warrant designate the division of the District Court to which the search warrant should be returned; it further requires that the District Court Judge upon request deliver a copy of the inventory to the indicated individuals and, finally, requires the Judge of the District Court to whom the warrant is returned to attach to the warrant a copy of the return inventory and other papers and file them with the clerk of the District Court for the district and division in which the property was seized. This should unify the procedure for return of search warrants and assure that they are readily available for inspection by Counsel for the state and counsel for the defendant in the office of the clerk of the District Court. It is of the utmost importance that the clerk note filing in the criminal docket. In the event of a suppression motion in the Superior Court, the Superior Court can order that the records be transferred to the Superior Court for its examination in connection with the suppression motion.

Advisory Committee Note – 1976

[M.R. Crim. P. 41(c).] This amendment makes Rule 41(c) similar to the corresponding federal rule. It eliminates the necessity of stating the grounds for probable cause in the warrant although still requires that the names of the persons whose affidavits were taken in support of the issuance of the warrant appear on the warrant. This will eliminate many of the difficulties encountered in State v. Gamage, 340 A.2d 1 (1975). The amendment also permits a warrant to be executed in the nighttime if authorized by the issuing authority for reasonable cause, eliminating the necessity that the affidavit be "positive" for a nighttime search.

Advisory Committee Note – 1978

Maine Rule of Criminal Procedure 41(c):

The first, second, and fifth sentences of Rule 41(c) are amended to make them consistent on the following two points: 1) That either a person or a place may be searched pursuant to a warrant and 2) That a search of a place may be for either a person or property. The first sentence recognized the second point but

not the first. The second and fifth sentences recognized the first point but not the second. The amendment makes all three sentences consistent.

The fifth sentence is amended to delete "forthwith." Inclusion of the term set up an inconsistency with the specific ten-day time limit in Rule 41(d), first sentence. "Forthwith" was deleted from F.R.Cr.P. 41(c) in 1972 in favor of a specific time limit.

The sixth sentence is amended to substitute a definite time period for the somewhat vague term "daytime." The times are defined by 1 M.R.S. § 151. The Federal Rule was amended in 1972 to define "daytime" as a specific time period. F.R.Cr.P. 41 (h). Some law enforcement officers have expressed concern over the vagueness of the present term.

The term "judge or complaint justice" is substituted for the terms "issuing authority" or "person authorized by this rule to issue warrants," with which it had been used interchangeably.

Maine Rule of Criminal Procedure 41(d):

The third sentence of Rule 41(d) is added to make clear that personal service of the warrant and receipt is to be effected if practicable. In the fourth sentence the words "shall be made promptly and" are deleted as they add nothing to the specific deadline imposed by the first sentence. The fifth sentence is amended to require that, if practicable, the inventory be made in the presence of the person from whose possession or premises the property was taken, whether or not the applicant for the warrant is one of the executing officers. Previously, the requirement hinged on the largely fortuitous circumstance whether the applicant was one of the executing officers.

Advisory Committee Note – 1980

Maine Rule of Criminal Procedure 41(a):

Rule 41(a) is amended to conform to 15 M.R.S. § 55, as repealed and replaced by 1979 Laws, c. 343, § 1, authorizing district judges and complaint justices to issue search warrants "for any place in the State . . ." (15 M.R.S. § 55).

Maine Rule of Criminal Procedure 41(b):

Rule 41(b) is amended to broaden its coverage consistent with 15 M.R.S. § 55 and to bring it back into conformity with F.R.Cr.P. 41(b), as amended effective August l, 1979.

Maine Rule of Criminal Procedure 41(c):

Rule 41(c) is amended to conform to that portion of 15 M.R.S. § 55, as repealed and replaced by 1979 Laws, c. 343, § 1, which authorizes evidence in support of a search warrant to consist of "affidavits and other evidence under oath or affirmation which is capable of being reduced to a record for purposes of review" (15 M.R.S. § 55). Settle of the new language of Section (c) is taken from F.R.Cr.P. 41(c).

Advisory Committee Note – 1983

[M.R. Crim. P. 41(e).] The kinds of evidence which may be suppressed and the grounds of suppression have expanded greatly since Rule 41(e) was first adopted. Although Rule 41(e) speaks of suppressing "property," that term has been expansively construed. *See State v. Taylor*, 438 A.2d 1279 (Me. 1982) (Rule 41(e) covers suppression of test results). However, doubts about the scope of rule 4l(e) still remain—principally whether it covers statements of a defendant (*see Taylor*, 438 A.2d at 1281).

The common thread which runs through all suppression situations is an inquiry into how the evidence was obtained. The issue whether the evidence was illegally obtained should typically be decided prior to trial, for the reasons canvassed in *State v. Bishop,* 392 A.2d 20, 22-23 (Me. 1978).

The addition of a new rule 41A is designed to provide a clear basis for a motion to suppress any evidence which was arguably illegally obtained, when determination of the issue before trial may serve the same policies as those served by present Rule 41(e). As such it is a specialized case of a motion in limine (See Rule 12(c)).

Rule 41(e) is contracted to provide simply for a motion for return of property.

Advisory Committee Note – 1983

[M.R. Crim. P. 41(e).] The second paragraph of Rule 41(e) is added to make clear that a Rule 41(e) motion is available in the District Court only in a prosecution for a Class D or Class E offense and only during the period that the District Court has jurisdiction over the offense. If no criminal pleading has been filed a Rule 41(e) motion should be brought in Superior Court.

Advisory Committee Note – 1996

[M.R. Crim. P. 41(c).] *See* Advisory Committee Note to M.R. Crim. P. 41(h).

[M.R. Crim. P. 41(h).] The amendment physically moves that portion of subdivision (c) heretofore addressing the time of day authorized for the execution of a search warrant to new subdivision (h) devoted solely to that matter. Secondly, it extends the definition of daytime warrants from "7 a.m. to 7 p.m." to "7 a.m. to 9 p.m." The change is intended to minimize confusion and to more closely approximate the provisions of Federal Rule of Criminal Procedure 41(h). The change is consistent with the trend in neighboring jurisdictions. *See*, *e.g.*, N.Y. Crim. Proc. Law § 690.35 (McKinney 1995) (6:00 A.M. to 9:00 P.M.); Vt. R. Crim. P. 41(c) (6:00 A.M. to 10:00 P.M.); *State v. Barron*, 137 N.H. 29, 623 A.2d 216 (1993) (New Hampshire requires no special showing for nighttime execution); *Commonwealth v. Grimshaw*, 413 Mass. 73, 81, 595 N.E.2d 302, 307 (1992) (statutory reference in Mass. Gen. Laws Ann. ch. 276, § 2 to "daytime" and "nighttime" being undefined, SJC adopts federal rule of 6:00 A.M. to 10:00 P.M. "in keeping with current lifestyles").

[M.R. Crim. P. 41(i).] The amendment recognizes the holding of the United States Supreme Court in *Wilson v. Arkansas*, 514 U.S. ___, 115 S. Ct. 1914 (1995) (Decided May 22, 1995) that the common-law knock and announce principle, as applied to dwellings, forms a part of the Fourth Amendment's reasonableness inquiry and is now controlling law in Maine. In *Wilson*, the Court acknowledged that the knock and announce rule was not absolute. The Court noted: "This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Wilson*, 115 S. Ct. 1914, 1918 (1995).

The amendment recognizes the authority of a judge of the district court or justice of the peace to issue a search warrant which authorizes executing officers to refrain from knocking and announcing their purpose and office prior to execution if the judge or justice finds reasonable cause to believe that certain countervailing law enforcement interests exist. The amendment is premised upon the broad enabling language contained in 15 M.R.S. § 55 which authorized the issuance of a search warrant "in any reasonable manner . . . for any constitutional purpose."

Wilson validates, and new subdivision (i) incorporates, the following circumstances allowing for the issuance of an unannounced entry search warrant:

(1) *Destruction of Evidence Justification*: The constitutionality of dispensing with the knock and announce principle when police have reason to believe that evidence or property sought may be destroyed is well recognized. *Wilson* at 1919, *citing Ker v. California*, 374 U.S. 23, 40-41 (1963) (Plurality opinion) and *People v. Maddox*, 46 Cal. 2d 301, 305-306, 294 P.2d 6, 9 (1956). The reference in the amendment to "quickly or easily . . . destroyed . . . or disposed of" is adopted from Nebraska's no-knock statute, Neb. Rev. State. § 29-411 (Reissued 1979), which was held constitutional in *State v. Meyer*, 209 Neb. 757, 311 N.W.2d 520 (1981). The terms "altered," "concealed" and "removed" are intended to have the same meaning as identical terms in Maine's Falsifying Physical Evidence crime, 17-A M.R.S. § 455(1)(A).

(2) *Escape Justification*: Where a search warrant authorizes the search and seizure of a person pursuant to M.R. Crim. P. 41(b)(4) and officers can demonstrate that they have reasonable cause to believe that announcing their presence and purpose would aid a subject in an escape, the practice of dispensing with the announcement procedure would be recognized under the amendment as it is in case law. *Wilson* at 1918, *citing* W. Murfee, Law of Sheriffs and Other Ministerial Officers § 1163, p. 631 (1st ed. 1884) ("[A]lthough there has been some doubt on the question, the better opinion seems to be that, in cases of felony, no demand of admittance is necessary, especially as, in many cases, the delay incident to it would enable the prisoner to escape").

(3) *Physical Violence Theory*: The *Wilson* Court expressly recognized that the safety of executing officers and others may constitute a countervailing law enforcement interest justifying an unannounced execution. *Wilson* at 1918, *citing Read v. Case*, 4 Conn. 166, 170 (1822) (plaintiff who "had resolved . . . to resist even to the shedding of blood . . . was not within the reason and spirit of the rule requiring notice"); *Mahomed v. The Queen*, 4 Moore 239, 247, 13 Eng. Rep. 293,

296 (P.C. 1843) ("While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary"). The terms "deadly" and "non-deadly force" are intended to have the same meanings as set forth in 17-A M.R.S. § 2(8) and (18).

(4) *Countervailing Facts and Circumstances*: The amendment would authorize a judge of the District Court or a justice of the peace to issue a warrant authorizing its unannounced execution if satisfied that reasonable cause exists which would otherwise render the unannounced execution of the warrant reasonable. In *Wilson*, the Court, recognizing the myriad of potential factual circumstances, declined to attempt to identify all justifiable exceptions to the requirement that executing officers announce their purpose and office. The Court noted: "We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a *dwelling* might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." *Id*. at 1919 (emphasis added).

In recognizing in new subdivision (i) the authority of a judge or justice to issue an unannounced execution warrant based upon information known to officers prior to execution, no inference is intended to be generated thereby which would *require* officers to seek such authorization in advance or would prohibit them from executing a warrant without first announcing their presence and purpose if reasonable cause were generated after issuance, but prior to execution. *Parsley v. Superior Court*, 9 Cal. 3d 934, 109 Cal. Rptr. 563, 513 P.2d 611 (1973) (determination of existence of exigency justifying immediate unannounced entry must be left to executing officer subject to subsequent examination); 2 W. LaFave, *Search and Seizure* § 4.8(g) at 289 (1987) (majority of courts and commentators assume police are never required to present unannounced entry issue before issuing magistrate). However, where officers have sought and obtained a search warrant authorizing in advance its unannounced execution, the burden would shift to opponents of the warrant to either impeach the affidavit or otherwise demonstrate the overall unreasonableness of the search including its manner of execution. *United States v. Moore*, 956 F.2d 843, 850-51 (8th Cir. 1992).

Finally, in recognizing by rule the authority of a judge or justice to issue an unannounced execution warrant or nighttime warrant, no inference is intended to be generated that would preclude the authority of a judge or justice to issue any other reasonable search warrant for any constitutional purpose. The identification in the rule of only two variations of a standard search warrant (nighttime and unannounced execution) is not intended to preclude a court's authority to issue other search warrants constitutionally tailored to different or unusual circumstances. *See, e.g., Dalia v. United States*, 441 U.S. 238, 247 (1979) (no constitutional basis for proscribing covert entry to install legal electronic bugging device); *United States v. Villegas*, 899 F.2d 1324 (2nd Cir. 1990) (court authorized delay of service of search warrant inventory not violative of constitution or rule); *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988) (anticipatory search warrant permissible).

Advisory Committee Note – 1997

[M.R. Crim. P. 41(h).] *See* Advisory Committee Note to M.R. Crim. P. 41(i).

[M.R. Crim. P. 41(i).] The amendment deletes the verb "served" and replaces it with the verb "executed" in order to more accurately and fully describe the actions of officers authorized to conduct a search under a warrant. The term "served" is narrower in meaning than "executed," generally implying only the delivery of a copy of the search warrant upon some person, and is not wholly consistent with the provisions of subsection (i) regarding the unannounced execution of search warrants or the execution of the warrant at a residence when no person is present pursuant to subsection (d).

Advisory Committee Note – 1998

[M.R. Crim. P. 41(c).] Although not expressly stated therein, Rule 41(c) currently contemplates that a search warrant is normally issued after an *ex parte* application by the State and an *in camera* consideration by a judge or justice of the peace and that secrecy automatically continues until after execution and return. This historical practice has been recognized with approval by the United States Supreme Court as well. *See Franks v. Delaware*, 438 U.S. 154, 169 (1977) ("proceeding is necessarily *ex parte*; since the subject of the search cannot be tipped off to the application of a warrant lest he destroy or remove evidence"). *See also United States v. United States Dist. Court*, 407 U.S. 297, 321 (1972) (given that warrant proceeding is not "public" government had to comply with warrant

provision of the Fourth Amendment when engaging in domestic intelligence gathering activity, notwithstanding the importance of keeping domestic investigations secret). Notwithstanding the fact that the information disclosed to a judge or justice of the peace in warrant proceedings is entitled to automatic nondisclosure until after execution and return in order to protect the nature and scope of an ongoing criminal investigation, search warrant materials recently have nonetheless been made available to the public by the District Court as soon as such materials are in its possession on the mistaken belief that they are public records. This amendment to Rule 41(c) is designed to expressly recognize the historical practice and end premature disclosure by the District Court. *See also* Advisory Committee Note to M.R. Crim. P. 41(f).

[M.R. Crim. P. 41(f).] Search warrant materials routinely become public after execution and return. Nevertheless, the court has the inherent power to order the impoundment of warrant materials post-return and even after indictment under appropriate circumstances. *See generally, Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989); *Times Mirror Co. v. U.S.*, 873 F.2d 1210 (9th Cir. 1989). *See also In re Search Warrants Issued August 29, 1994*, 889 F. Supp. 296 (D. Ohio 1995). Commonly it is the State seeking by motion an order of impoundment, although presumably it could be another, such as a defendant. *See, e.g., Matter of Application and Affidavit for a Search Warrant*, 923 F.2d 324 (4th Cir. 1991), *cert. denied*, 500 U.S. 944. This amendment to Rule 41(f) expressly recognizes the court's inherent power to impound after execution and return but leaves to developing case law what constitutes "good cause" for an order of impoundment. The amendment also precludes an open-ended impoundment order by requiring that an end point be specified, either by setting forth a fixed date or by naming a specific future event. For example, the event extinguishing the order of impoundment might be the return of an indictment or the commencement of the trial. *See* Advisory Committee Note to M.R. Crim. P. 41(c).

Advisory Note – June 2006

M.R. Crim. P. 41(b). The amendment replaces the term "criminal offense" with the term "crime." This reference to a variant of "offense" was overlooked when a similar reference in the subdivision was replaced with "crime" effective January 1, 2004. *See* Me. Rptr., 832-845 A.2d XLIV, LX.

Advisory Note – July 2010

The amendment to M.R. Crim. P. 41(e) subdivision clarifies that a party may file a motion for return of seized property in that court in which a charge related to or arising from the seizure is pending. If no charge has been filed, the motion is to be brought in the Superior Court located in the county in which the property was seized.

Advisory Note – November 2011

The amendment deletes the definition of the "property" that is subject to search and seizure, which dates from the original promulgation of the Criminal Rules in 1965. See Glassman, *Maine Practice: Rules of Criminal Procedure Annotated,* Rule 41(g) at 356 (1967). This definition is hopelessly outdated. It defines "property" to "include documents, books, papers and any other tangible objects." As early as 1982, the Law Court recognized that this definition was outdated, observing in *State v. Taylor*, 438 A.2d 1279, 1281 (Me. 1982):

> It is true that Rule 41(e) speaks of illegally seized "property" to be returned to the person aggrieved by the unlawful search and seizure unless otherwise subject to lawful detention. We do realize that the blood or breath samples underlying the results of their chemical analysis may not have been contemplated by the drafters of our criminal rules as returnable property within the meaning of the term "property" as defined in Rule 41(g) "to include documents, books, papers and any other tangible objects." Nevertheless, we hold that such evidence is subject to the provisions of Rule 41(e).

When Rule 41A was added, effective February 1, 1983, the Advisory Committee Note stated that the intent was "to provide a clear basis for a motion to suppress any evidence which was arguably illegally obtained." 2 Cluchey & Seitzinger, *Maine Criminal Practice* § 41 at VIII-54 (Gardiner ed. 1995). But the addition left undisturbed the definition of "property" in Rule 41(g), simply noting that "that term has been expansively construed." *Id.* A new expansive definition

of "property" is now found in M.R. Crim. P. 41(k). See also Advisory Note – November 2011 to M.R. Crim. P. 41(k).

Advisory Note – November 2011

New subdivision (k) defining "property" replaces the definition of "property" formerly contained in subdivision (g). See Advisory Note – November 2011 to M.R. Crim. P. 41(g). The new definition attempts to capture the expansive definition of "property" that has developed over decades of experience. Beyond the concept of "tangible objects," "property" now encompasses electronically stored information, biological materials and the other categories listed in Rule 41(k). See also Advisory Note – November 2011 to M.R. Crim. P. 41A(a)(1) and 41B.

Advisory Note – October 2013

The amendment makes a number of nonsubstantive changes to Rule 41, all designed to enhance readability and clarity. Specifically it:

(1) rearranges the order of three subdivisions within the rule – namely, subdivision (g) is redesignated subdivision (a) and its language is clarified; subdivision (k) is redesignated subdivision (d); and subdivision (e) is redesignated subdivision (j);

(2) redesignates current subdivision (a) as subdivision (b) and adds the words "a Search" to its heading after the word "Issue" and before the word "Warrant";

(3) redesignates current subdivision (b) as subdivision (c) and adds the words "of a Search Warrant" in its heading after the word "Issuance";

(4) breaks up former subdivision (c) into two new subdivisions designated (e) and (f);

(5) moves the special warrant provisions relating to a nighttime search and an unannounced search formerly found in subdivisions (h) and (i), respectively, into new subdivisions (f)(2)(B) and (f)(2)(C), respectively;

(6) redesignates current subdivision (d) as subdivision (g);

(7) redesignates current subdivision (f) as subdivision (h) and in its first sentence replaces the word "therewith" with the words "with the warrant"; and

(8) redesignates subdivision (j) as subdivision (i) and adds the words "with Clerk" in the heading after the word "Notice."

In addition, the amendment to Rule 41 makes the following substantive changes.

First, subdivision (b) (formerly subdivision (a)) is amended to expressly provide that a search warrant may be issued by a "Superior Court justice" as well as by a District Court judge or justice of the peace "as authorized by law." Although the term "District Court Judge" where appearing in the Maine Rules of Criminal Procedure definitionally includes, among others, a justice of the Superior Court sitting in the District Court by assignment, pursuant to Rule 57(d), the added reference in subdivision (b) is useful to the reader because justices of the Superior Court commonly sit in the District Court, and because there is no statutory basis for preventing Superior Court justices from granting warrant requests.

Second, a new subdivision (e) is added with the heading "Requesting a Search Warrant." It consists of three numbered paragraphs. Numbered paragraph (1) of subdivision (e) has no counterpart in current subdivision (c). It draws a distinction for purposes of obtaining a search warrant between a warrant request made in the presence of the Superior Court justice, District Court judge, or justice of the peace and a warrant request made outside the presence of the justice, judge, or justice of the peace. It provides that an in-presence application is normally required but allows for an outside-of-presence application if, upon request of the applicant, the justice, judge, or justice of the peace "determines it reasonable under the circumstances."

Numbered paragraph (2) of subdivision (e) contains the in-presence request procedure. It carries over the substance of the first unnumbered paragraph of former subdivision (c), but with two additions. First, it adds a reference to a tracking device in the context of what an affidavit must specifically designate. Second, it provides for evidence to be taken down by a court reporter or recording equipment, *or* recorded in a manner that is capable of producing a record adequate for purposes of review. The added language would allow the justice, judge, or justice of the peace who, for example, may be hearing evidence at home, to create a record by writing it down. As was the case in former subdivision (c), unlike Rule

41(d)(2)(B) of the Federal Rules of Criminal Procedure, a justice, judge, or justice of the peace may not wholly dispense with a written affidavit.

Numbered paragraph (3) of subdivision (e) serves as a signpost identifying new Rule 41C as the rule containing the out-of-presence request procedure.

Third, a new subdivision (f) is added with the heading "Issuing a Search Warrant." It consists of two numbered paragraphs. Numbered paragraph (1) of subdivision (f) carries over the substance of the second unnumbered paragraph of former subdivision (c) except that it leaves behind the former portion that required a judge or justice of the peace to issue a warrant if "satisfied that grounds for the application exist" as an apparent alternative to being satisfied "that there is probable cause to believe that they exist." Paragraph (1) also adds "except as otherwise provided in Rule 41B" relative to what must be designated in the search warrant as to "the person or place to be searched, and the person or property to be searched for."

Numbered paragraph (2) of subdivision (f) contains three subparagraphs. Subparagraph (A) carries over the substance of the third and fourth unnumbered paragraphs of former subdivision (c). It adds "[e]xcept as otherwise provided in Rule 41B" relative to what it commands the officer to do. Subparagraph (B) mirrors the substance of former subdivision (h). Subparagraph (C) mirrors the substance of former subdivision (i).

RULE 41A. MOTION TO SUPPRESS EVIDENCE

(a) Grounds of Motion. A defendant may move to suppress as evidence any of the following, on the ground that it was illegally obtained:

(1) property;

(2) statements of the defendant;

(3) test results;

(4) out-of-court or in-court eyewitness identifications of the defendant.

(b) Time of Making Motion. The motion shall be filed within the time specified in Rule 12(b)(3). For good cause shown, the court may entertain the motion at a time beyond that provided in Rule 12(b)(3).

(c) Hearing. The court shall receive evidence on any issue of fact necessary to the decision of the motion.

(d) Order. If the motion is granted, the court shall enter an order limiting the admissibility of the evidence according to law. If the motion is granted or denied, the court shall make findings of fact and conclusions of law either on the record or in writing.

If the court fails to make such findings and conclusions, a party may file a motion seeking compliance with the requirement. If the motion is granted and if the findings and conclusions are in writing, the clerk shall mail a date-stamped copy thereof to each counsel of record and note the mailing on the criminal docket. If the findings and conclusions are oral, the clerk shall mail a copy of the docket sheet containing the relevant docket entry and note the mailing on the criminal docket.

Advisory Committee Note—1983

[M.R. Crim. P. 41A.] The kinds of evidence which may be suppressed and the grounds of suppression have expanded greatly since Rule 41(e) was first adopted. Although Rule 41(e) speaks of suppressing "property," that term has been expansively construed. See *State v. Taylor*, 438 A.2d 1279 (Me. 1982) (Rule 41(e) covers suppression of test results). However, doubts about the scope of Rule 41(e) still remain-principally whether it covers statements of a defendant (*see Taylor*, 438 A.2d at 1281).

The common thread which runs through all suppression situations is an inquiry into how the evidence was obtained. The issue whether the evidence was illegally obtained should typically be decided prior to trial, for the reasons canvassed in *State v. Bishop,* 392 A.2d 20, 22-23 (Me. 1978).

The addition of a new rule 41A is designed to provide a clear basis for a motion to suppress any evidence which was arguably illegally obtained, when determination of the issue before trial may serve the same policies as those served by present Rule 41(e). As such it is a specialized case of a motion in limine (See Rule 12(c)).

Rule 41(e) is contracted to provide simply for a motion for return of property.

Advisory Committee Note—1986

[M.R. Crim. P. 41A(d).] The amendment imposes upon the hearing justice a duty to make findings of fact and conclusions of law as to suppression motions. Given both the legal and practical significance to each party of most rulings on motions to suppress, it is desirable to make the court's obligation to provide findings and conclusions absolute rather than conditional.

Advisory Committee Note—1989

[M.R. Crim. P. 41A(d).] The second paragraph of Rule 41A(d) is added to outline the procedure which should be followed in the event that a court, in acting on a Rule 41A motion, has not made findings of fact and conclusions of law as required by the first paragraph of Rule 41A(d).

Advisory Committee Note—1990

[M.R. Crim. P. 41A(b).] Rule 41A(b) is amended to apply the time limits of Rule 12(b)(3) to the filing of motions under Rule 41A. This is intended to eliminate the problem of the filing of motions to suppress on the eve of trial. The good cause requirement is satisfied if a defendant for good reason, did not have the opportunity to file the motion to suppress or was not aware of the ground for a motion to suppress during the time period provided by Rule 12(b)(3).

Advisory Committee Note – June 2005

[M.R. Crim. P. 41A(e).] Current subdivision (e) is deleted because the District Court, effective January 1, 2006, will no longer be the court for initiating a criminal case that involves murder or at least one Class A, Class B or Class C crime, accompanied or unaccompanied by related Class D or Class E crimes. Instead, under the new process, any case involving at least one Class C or above crime must be commenced by filing a criminal complaint directly in the Superior Court rather than in the District Court. The new process eliminates the need for a bind-over hearing. *See* M.R. Crim. P. 3(a) and (b) and 5A Advisory Committee's Note to March 24, 2005 amendments. It also eliminates circumstances existing under present practice in which related charges are pending in both the District Court and the Superior Court at the same time. The deletion of subdivision (e) is

effective July 1, 2006, to allow cases filed before January 1, 2006, to be processed according to present practice.

Advisory Note – November 2011

The amendment replaces the category of "physical objects" with the category "property." The former, like its synonym "tangible objects," is too narrow and is replaced by the newly expanded term "property," now defined in M.R. Crim. P. 41(k). See also Advisory Note – November 2011 to M.R. Crim. P. 41(g) and 41(k).

RULE 41B. SPECIAL PROVISIONS FOR SEARCHES AND SEIZURES OF CERTAIN KINDS OF PROPERTY

(a) Electronically Stored Information.

(1) **Contents of Warrant.** A warrant seeking electronically stored information may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The warrant may authorize the retention by the property owner of an electronic copy of such information necessary to avoid or mitigate business interruption or other disruptive consequences.

(2) **Execution of Warrant.** The time for executing the warrant in Rule 41(g) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(3) **Inventory.** The inventory may be limited to describing the physical storage media that were seized or copied.

(b) Information derived from a tracking device.

(1) **Definition of Tracking Device.** The term "tracking device" is used in this rule and in Rule 41 to mean an electronic or mechanical device which permits the tracking of the movement of a person or object.

(2) **Contents of Warrant.** A warrant for a tracking device must identify the person or property to be tracked and the District Court to which it must be returned. It must command the officer to complete any installation authorized by

the warrant within a specified time and specify a reasonable length of time that the device may be used.

(3) **Execution and Return of Warrant.** Notwithstanding Rule 41(g), within 10 calendar days after the use of the tracking device has ended the officer executing the warrant must return it to the court designated in the warrant. The time for executing the warrant in this paragraph refers to the use of the tracking device and not to any later data extraction and review. The officer must enter on the warrant the date and time the device was installed and the period during which it was used.

(4) **Service of Warrant.** Within 10 calendar days after the use of the tracking device has ended, the officer executing it must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by (A) delivering a copy to the person who, or whose property, was tracked; (B) leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location; or (C) mailing a copy to the person's last known address. The time may be extended by the court for good cause shown.

Advisory Note – November 2011

The provisions for search warrants in Rule 41 were originally drafted with "tangible objects" (former Rule 41(g)) in mind. See Advisory Note – November 2011 to M.R. Crim. P. 41(g). Once additional categories of "property" are specified in Rule 41(k), *See* Advisory Note – November 2011 to M.R. Crim. P. 41(k), it becomes important to recognize that each of these additional categories may necessitate special search warrant provisions. Rather than shoehorn these provisions into Rule 41, as Federal Rule 41 has done, it is new Rule 41B that contains these provisions.

Initially, special warrant provisions are now adopted for warrants for electronically stored information and for installation of a tracking device. Rule 41B is expandable to include special warrant provisions for additional categories of "property" as the need for them arises.

Subdivision (a) contains special warrant provisions for electronically stored information. It is modeled on Federal Rule 41(e)(2)(B). The term "electronically stored information" was not defined in the federal rule because its meaning is

generally understood from the civil discovery context. The Advisory Committee Notes to the 2006 amendment to Federal Civil Rule 34 stated:

> …[T]he growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic…. Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.
>
> ….Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.
>
> References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach….

Maine Civil Rule 34 has followed this approach. *See* Advisory Committee Note – July 2008 to M.R. Civ. P. 34. Subdivision (a)(2) complies with the Law Court's definition of the time when such a warrant is executed. See *State v. Nadeau*, 2010 ME 71, ¶¶ 46-48, 1 A.3d 445.

Subdivision (b) contains special warrant provisions for installation of tracking devices. It is modeled on Federal Rule 41(e)(2)(C) and (f)(2). The definition of "tracking device" in subdivision (b)(1) is taken from 18 U.S.C. § 3117(b). Unlike the federal rule, subdivision (b)(2) does not attempt to set an initial time limit and extension limits, but leaves the matter to case-by-case judicial discretion. Whether such a warrant is constitutionally required is an issue presently before the United States Supreme Court. *United States v. Jones*, No. 10-1259, U.S., (argued November 8, 2011). Having a warrant provision in place is a safe course in case a warrant is held constitutionally required. It is also good public policy in any event.

Advisory Note – December 2013

The amendment makes the following three non-substantive changes to rule 41B.

First, in both paragraph (2) of subdivision (a) and paragraph (3) of subdivision (b) the reference to subdivision (d) of Rule 41 is replaced by a reference to subdivision (g) because subdivision (d) of Rule 41 was recently redesignated subdivision (g). *See* M.R. Crim. P. 41(g); *see also* Advisory Note – October 2013 to M.R. Crim. P. 41, numbered paragraph (6).

Second, in the first sentence of paragraph (3) of subdivision (b) the comma between the word "ended" and the word "the" is deleted as unnecessary.

Third, in the first sentence of paragraph (3) of subdivision (b) the words "pursuant to Rule 41(f)" are replaced by the words "to the court designated in the warrant" for correctness and clarity.

RULE 41C. SEARCH WARRANT REQUEST MADE BY APPLICANT OUTSIDE THE PRESENCE OF THE SUPERIOR COURT JUSTICE, DISTRICT COURT JUDGE, OR JUSTICE OF THE PEACE

(a) In General. A Superior Court justice, District Court judge, or justice of the peace may, upon request of the applicant, allow a search warrant request to be made outside the presence of the justice, judge, or justice of the peace if the justice, judge, or justice of the peace determines it to be a reasonable request under the circumstances.

(b) Procedures to be Applied. If the Superior Court justice, District Court judge, or justice of the peace allows the applicant to make the search warrant request outside the presence of the justice, judge, or justice of the peace, the following procedures apply:

(1) The request must be in the form of a written affidavit transmitted by reliable electronic means to the Superior Court justice, District Court judge, or justice of the peace. The contents of the affidavit must conform to Rule 41(e)(2). The applicant, by telephone or other reliable electronic means, must attest to its contents, and the justice, judge, or justice of the peace must acknowledge the attestation in writing on the affidavit. Before ruling on the request, the justice, judge, or justice of the peace may hear evidence under oath or affirmation by

telephone or other reliable means which shall be taken down by a court reporter or recording equipment, or recorded in a manner that is capable of producing a record adequate for purposes of review.

(2) In addition to the written affidavit, the applicant shall prepare a proposed search warrant and transmit it by reliable electronic means to the Superior Court justice, District Court judge, or the justice of the peace. The contents of the warrant must conform to Rule 41(f)(2) or, when applicable, Rule 41B(a)(1) or 41B(b)(2). The transmission received by the justice, judge, or justice of the peace may serve as the original.

(3) If the Superior Court justice, District Court judge, or justice of the peace is satisfied that there is probable cause to believe that the grounds for the application exist, the justice, judge, or justice of the peace shall sign the proposed search warrant or a modified version, enter the date and time of issuance on the warrant, and transmit it by reliable electronic means to the applicant. A copy of the issued search warrant shall promptly be filed with the District Court designated in the warrant.

(c) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

Advisory Note – October 2013

Rule 41C allows a search warrant request to be made outside the presence of a Superior Court justice, District Court judge, or justice of the peace if requested by the applicant and permitted by the justice, judge, or justice of the peace upon a determination that the request is reasonable under the circumstances. See also Advisory Note – October 2013 to M.R. Crim. P. 41(e). Rule 41C is added to provide the needed procedures for a permitted out-of-presence search warrant request.

Rule 41C has three subdivisions. Subdivision (a) is a restatement of the preconditions contained in Rule 41(e)(1) for pursuing a search warrant request outside the presence of the justice, judge, or justice of the peace. Subdivision (b) provides the procedures to be applied if the preconditions in subdivision (a) are satisfied. These procedures are to the extent feasible the same as the procedures applicable to an application request made in the presence of a justice, judge, or

justice of the peace pursuant to Rule 41(f). The key difference in procedures as provided in Rule 41(f) and Rule 41C reflects the fact that, unlike in-person procedures, the written affidavit and warrant must be transmitted by reliable electronic means, as must any additional evidence to be taken remotely, and the finalized signed warrant to be returned to the applicant by the justice, judge, or justice of the peace. Subdivision (c) mirrors the substance of Rule 4.1(c) of the Federal Rules of Criminal Procedure and serves the same purpose.

RULE 42. CONTEMPT PROCEEDINGS

Procedures to implement the inherent and statutory powers of the court to impose sanctions for contempt arising out of any criminal proceeding are set out in Rule 66 of the Maine Rules of Civil Procedure.

Advisory Committee Note—1994

[M.R. Crim. P. 42.] See Advisory Committee Note to M.R. Crim. P. 5(b), February 15, 1994 amendment.

Advisory Committee Note—1997

[M.R. Crim. P. 42.] The provisions of M.R. Crim. P. 42 are deleted and replaced. Identical procedures in the Civil (M.R. Civ. P. 66) and Criminal rules (M.R. Crim. P. 42) are now provided that will clarify present confusion about contempt and provide a road map applicable to all contempt proceedings.

Subdivision (a) is intended to make the rule applicable to a contempt proceeding unless the imposition of sanctions is specifically covered by rule or specific statutory provisions. For example, the rule does not apply to the specific sanctions found in other provisions of the Civil and Criminal rules. *See, e.g.*, M.R. Civ. P. 11, 37, 76(f); M.R. Crim. P. 16(d), 16A(d). Nor does it apply to a statutory provision such as 17-A M.R.S. § 1304 (1983 & Supp. 1995). Paragraph (3) assures that the proceeding will follow the correct procedural path, according to whether the contempt occurred in or outside the presence of the court and whether punitive or remedial sanctions are sought.

Subdivision (b) provides a summary procedure for contempt occurring in open court and actually seen or heard by the judge or justice. Both punitive and remedial sanctions may be sought in the same summary proceeding for such a contempt. In the court's discretion, plenary proceedings under subdivision (c) or

(d) may be used for in-court contempt. Sanctions must be proportionate to the offense. *State v. Alexander*, 257 A.2d 788 (Me. 1969). There is no right to jury trial. *State v. Spickler*, 637 A.2d 857 (Me. 1994). The alleged contemnor may be heard through counsel if counsel is present.

Subdivision (c) provides for a plenary proceeding when punitive sanctions are sought. Remedial sanctions may be imposed in the same proceeding. Jury trial is provided if the court expects to seriously consider imposing a punitive sanction of a serious punitive fine or imprisonment in excess of 30 days upon adjudication of contempt. The language "serious punitive fine" is taken from *United Mine Workers v. Bagwell*, 512 U.S. 821, 837-39 (1994), which used it to describe the constitutional trigger for the right to jury trial. That Court, in holding that a $52,000,000 fine against the labor union was "unquestionably . . . a serious contempt sanction," found it unnecessary to "answer . . . the difficult question where the line between petty and serious contempt fines should be drawn." *Id*. at 837, n.5. However, it did point out that in *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975) it had held that a fine of $10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to a jury trial and also cited to "18 U.S.C. § 1(3) (defining petty offenses as crimes 'the penalty for which . . . does not exceed imprisonment for a period of six months or a fine of not more than $5,000 for an individual and $10,000 for a person other than an individual, or both')" as additional source material supporting the proposition. *Id*. The Court's reference to the current language of 18 U.S.C. § 1(3) serves to at least suggest what "magnitude of contempt fine" constitutes a serious punitive fine. *Id*. The potential imposition of a punitive sanction of up to 30 days imprisonment does not trigger the right to a jury trial under the United States Constitution. *Bloom v. Illinois*, 391 U.S. 184 (1968). Nor would such potential imposition trigger a jury trial right under the common law. *Id*. at 196. *See also Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31, 36-39 (1890). Although the issue was left open in *State v. Sklar*, 317 A.2d 160, 171 n.11 (Me. 1974), the Maine Constitution, like that of its mother Commonwealth, presumably accords no jury trial right. *See generally, Root v. MacDonald*, 157 N.E. 684, 691 (Mass. 1927); *Miaskiewicz v. Commonwealth*, 402 N.E.2d 1036 (Mass. 1980). An alleged contemnor has the right to retained or appointed counsel as provided in Rule 44 of the Maine Rules of Criminal Procedure. Proof that the alleged contemnor has acted "intentionally, knowingly or recklessly" satisfies the state of mind element.

Subdivision (d) provides a plenary proceeding for remedial sanctions for contempt, designed either to coerce obedience to an order of the court or to compensate a party injured by disobedience. Remedial sanctions may also be

awarded for in-court contempt under subdivision (b) or in conjunction with punitive sanctions under subdivision (c). The procedure is consistent with 14 M.R.S. §§ 252 and 3136 (Supp. 1995). There is no right to trial by jury in proceedings for remedial sanctions. *City of Rockland v. Winchenbaugh*, 667 A.2d 602, 604 (Me. 1995). The standard of proof is that of clear and convincing evidence. This is consistent with the standard in all the federal circuits, *see, e.g., Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991), and with the Law Court's decision in *Small v. Small*, 413 A.2d 1318, 1325, n.7 (Me. 1980). The opportunity to purge gives the imprisoned contemnor "the keys to his freedom." *Slauenwhite v. Slauenwhite*, 679 A.2d 93, 94 (Me. 1996). *See also Bagwell*, 512 U.S. 821 at 828-29.

Advisory Committee Note—1998

[M.R. Crim. P. 42(b)(5).] The amendment reflects the new appellate enabling legislation expressly providing for an appeal in *summary* contempt proceedings involving punitive sanctions, accompanied or unaccompanied by remedial sanctions, by an aggrieved contemnor—namely, 15 M.R.S. § 2115-B(1). *See* P.L. 1997, ch. 317, § B-1; L.D. 1490 Summary at pages 3-4 (118th Legis. 1997). An aggrieved contemnor must first appeal to the Superior Court acting as an intermediate appellate court if the summary proceeding is before a judge of the District Court, Probate Court or Administrative Court and, if unsuccessful, to the Law Court. If the summary proceeding is before a Superior Court or Supreme Court Justice, an aggrieved contemnor's appeal is to the Law Court.

[M.R. Crim. P. 42(b)(6).] This new paragraph (6) is added to highlight the new Maine Bail Code provisions specifically addressing bail in the context of a *summary* contempt proceeding involving a punitive sanction. *See* P.L. 1997, ch. 317, § A-1; L.D. 1490 Summary at pages 2-3 (118th Legis. 1997). Bail in such a proceeding is wholly within the discretion of the court. *See* 15 M.R.S. §§ 1004 and 1103.

[M.R. Crim. P. 42(c)(3).] The amendment modifies paragraph 3 of subdivision (c) in three particulars. First, a new first sentence is added to subdivision (c). That sentence expressly addresses the preconditions for punitive-sanction imposition relating to *acts of commission*. It provides that in order to impose a punitive sanction for an act or acts of commission a court must find beyond a reasonable doubt both the prohibited affirmative conduct constituting the contempt and the accompanying requisite alternative culpable mental state ("intentionally, knowingly or recklessly"). Second, the final sentence of

subdivision (c) is amended to uniquely address the precondition for punitive-sanction imposition relating to *acts of omission* ("failure or refusal to act"). It provides that in order to impose a punitive sanction for a failure or refusal to perform an act or acts required by court order, a court must find beyond a reasonable doubt that prohibited omission, the accompanying requisite alternative culpable mental state ("intentionally, knowingly or recklessly") and an "ability" on the part of the alleged contemnor "to perform the required act." Third, a number of formalistic changes have been made to this same final sentence of subdivision (c) to enhance its clarity.

[M.R. Crim. P. 42(c)(5).] The amendment reflects the new appellate enabling legislation expressly providing for an appeal in *plenary* contempt proceedings involving punitive sanctions, accompanied or unaccompanied by remedial sanctions, by an aggrieved contemnor—namely, 15 M.R.S. § 2115-B(2). *See* P.L. 1997, ch. 317, § B-1; L.D. 1490 Summary at page 4 (118th Legis. 1997). If trial is other than in the Superior Court or the Supreme Judicial Court, an aggrieved contemnor must first appeal to the Superior Court acting as an intermediate appellate court and, if unsuccessful, to the Law Court. If trial is in the Superior Court or the Supreme Judicial Court, an aggrieved contemnor's appeal is to the Law Court.

[M.R. Crim. P. 42(c)(6).] This new paragraph (6) is added to highlight the new Bail Code provision specifically addressing bail in the context of a *plenary* contempt proceeding involving a punitive sanction. *See* P.L. 1997, ch. 317, § A-1; L.D. 1490 Summary at pages 2-3 (118th Legis. 1997). The Bail Code applies fully in such a proceeding. *See* 15 M.R.S. § 1004.

[M.R. Crim. P. 42 (d)(2)(D)(i) and (ii).] The amendment corrects a drafting error by conditioning the imposition of a remedial sanction relative to either acts of commission or acts of omission (failure or refusal to act) upon proof of an accompanying requisite alternative culpable mental state ("intentionally, knowingly or recklessly"). The amendment further abandons the current language of (i) and (ii) in favor of conforming their substance to the amended language of paragraph (3) of subdivision (c).

Advisory Committee Notes—1999

[M.R. Crim. P. 42(c)(2)(E).] This amendment replaces "bench warrant" with "warrant or order of arrest" to provide maximum latitude in securing the

prompt arrest of an alleged contemnor who fails to appear as required for a plenary proceeding.

[M.R. Crim. P. 42(d)(2)(E).] *See* Advisory Committee Note to M.R. Crim. P. 42(c)(2)(E).

Advisory Committee Notes—2001

Rule 42, subdivisions (a), (b) and (d) are amended to revise and clarify language that has created confusion in implementation of the 1997 rule changes. These same amendments to subdivisions (a), (b) and (d) have already been adopted in Rule 42's civil rule counterpart—namely, M.R. Civ. P. 66(a), (b) and (d)—effective June 1, 2000. The substantive changes to subdivisions (a), (b) and (d) are as follows:

1. The definition of "contempt," subsection (a)(2)(A)(i), is broadened to include any obstructing, demeaning, or hindering action, returning to the interpretation, prior to the 1997 amendment, which narrowed the definition. "Contempt of court may be defined as an act which is calculated to embarrass, hinder or obstruct a court in the administration of justice or which is calculated to lessen its authority or dignity." *In re Bernard*, 408 A.2d 1279, 1281 n.2 (Me. 1979) citing *in re Holbrook*, 133 Me. 276, 280 (1935).

2. The definition of punitive sanction, subsection (a)(2)(B), is amended to recognize that it may be imposed either to punish a completed act of contempt or to punish and stop an ongoing act of contempt. The existing definition with the word "retrospectively" created concern that contempt could not be imposed until after the contemptuous act or disruption was completed. Sometimes the court must act while the disruption is ongoing.

3. Subsection (a)(3) is revised to remove the requirement for citation of a specific subsection of this rule as part of the initiation of a contempt proceeding.

4. Subsection (a)(4) is removed. The general law regarding disqualification and recusal would continue to apply, as it always has, in contempt proceedings.

Discussing the former disqualification rule under M.R. Crim. P. 42(b), the Law Court, in *Alexander v. Sharpe*, 245 A.2d 279, 285 (Me. 1968) stated:

Rule 42(b) expressly excepts from this requirement the action of a justice for contempts occurring in the justice's presence. Neither our Rule 42(a) nor the Federal Rule from which ours was adopted disqualifies the Presiding Justice from dealing with contempts committed in open court in his presence in cases where the alleged contemptuous conduct, besides offending the orderliness of the proceedings, also impugns the integrity of the Justice. The need for summary action plus the advantage of the presiding justice's first hand observation of the offending actions and their background must be balanced against the danger that personal resentment may enter into the Justice's evaluation of the incident.

Accordingly, no special rule governing disqualification is needed in contempt proceedings.

5. Subdivisions (b)(1) and (2) are revised to follow the summary contempt language and practice of the first sentence of F.R. Crim. P. 42(a). Under this revision, summary contempt may be imposed where contempt is committed in the actual presence of the court. Subparagraphs (A) and (B) of subdivision (b)(2) are stricken as unnecessary, and subparagraphs (C) and (D) are incorporated into the text of subdivision (b)(2). These amendments are designed to return summary contempt practice to practice as it existed prior to the 1997 amendments.

6. Subdivision (b)(3) is amended to increase the fine cap for summary contempts from $1000 to $5000.

7. Subsection (d)(2)(C) is amended to permit the court to order that a hearing be held less than 10 days after service in appropriate circumstances. Such may be particularly important in cases seeking contempt for violation of parental rights orders.

8. Subsection (d)(2)(D) is amended to remove the prohibition on court appointed counsel. There may be circumstances such as alleged violation of child protective orders or termination of parental rights orders, where individuals may have rights to court appointed counsel as a result of operation of other provisions of law. Because the general law regarding assistance of counsel and right to court appointed counsel applies to such proceedings, and there generally is no such right in civil proceedings with some exceptions, removal of the entire sentence is recommended.

9. Subsection (d)(3) is amended to specify that sanctions may be imposed after a finding of contempt but during the same contempt proceeding. This

removes concern that two hearings may be required to complete a remedial contempt process.

This is not inconsistent with *Wells v. State*, 474 A.2d 846 (Me. 1984). In *Wells*, the petitioners had been jailed without any judicial determination of ability to pay their unpaid debt, 474 A.2d at 851. The Court held that a "subsequent hearing" on ability to pay was required, but only because that determination had not been made in the initial contempt hearing, 474 A.2d at 852. A trial court may address and decide all contempt issues in one hearing.

Advisory Committee Note—2003

Rule 42 has been abrogated except to serve as a signpost directing the reader to apply the procedures contained in Rule 66 of the Maine Rules of Civil Procedure when implementing the inherent and statutory powers of the court to impose punitive and remedial sanctions for contempt arising out of any criminal proceeding.

Currently contempt proceedings arising out of a criminal case are addressed in Rule 42 while contempt proceedings arising out of a civil case are addressed in Rule 66 of the Maine Rules of Civil Procedure. The existence of two contempt rules rather than one has created unnecessary confusion for both the bench and the bar. *See*, *e.g.*, *State v. Manter*, 2001 ME 164, ¶ 5, 784 A.2d 513, 514 (defendant arguing erroneously that punitive contempt had to be pursued under Rule 42 rather than Rule 66 even though contempt charges arose out of a civil matter); *State v. Pelletier*, 2001 ME 173, ¶ 2, 786 A.2d 609, 610-11 (trial court applied Rule 66 rather than Rule 42 even though summary contempt arose out of a criminal matter).

Additionally, because proceedings made available under each rule to address contumacious behavior arising in an underlying criminal or civil case—namely, summary and plenary for punitive sanctions or plenary for remedial sanctions—must of necessity be uniform, changes made to one should simultaneously be made to the other. However, in actual practice changes have not been successfully coordinated. Significant changes made to Rule 66, effective June 1, 2000 (*see* Me. Rptr., 746-754 A.2d XLVII-XIIX and LII), were made to Rule 42, (*see* 2002 Maine Rules of Court at 197-200), some changes made to Rule 42 have not been made in Rule 66 (*see* Me. Rptr., 699-709 A.2d, XCI, XCIX-C, CV-CVI and February 16, 1999 (*see* Me. Rptr., 716-724 A.2d LIII, LXI-LXII, LXV).

Collapsing the current two rules into one eliminates this ongoing nonconformity problem.

IX. GENERAL PROVISIONS

RULE 43. PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury, and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In any criminal prosecution the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict and imposition of sentence. A corporation may appear by counsel for all purposes. In any criminal prosecution for a Class D or Class E crime, the court may permit arraignment, plea, trial and imposition of sentence of a represented defendant in the defendant's absence.

Advisory Committee Note—1976

[M.R. Crim. P. 43.] This amendment is to accommodate the new Criminal Code, Title l7-A of the Maine Revised Statutes, in which criminal homicide of the 1st and 2nd degree replace the old charge of murder. See: 17-A M.R.S. §§ 201 and 202.

Advisory Committee Note—1977

[M.R. Crim. P. 43.] Rule 43 of the Maine Rules of Criminal Procedure: See Note 1.

[1. Rule 7(a) of the Maine Rules of Criminal Procedure:

This amendment conforms the Rule to the re-introduction in the Criminal Code of the crime of murder, 17-A M.R.S. § 201, in lieu of the crimes of homicide in the first and second degree. P.L. 1977, c.510, § 38, effective October 24, 1977.]

Advisory Committee Note—1981

[M.R. Crim. P. 43.] The deleted sentence provides for the presence of the defendant "at proceedings for post-conviction relief under Rule 35(b)." Rule 35(b) no longer exists; more importantly, the whole subject of proceedings for post-conviction review is now covered comprehensively by statute, 15 M.R.S. c. 305-A,

and by these rules. Any provision dealing with the presence of the defendant at a proceeding for post-conviction review belongs there.

Advisory Committee Note—1990

[M.R. Crim. P. 43.] The amendment to Rule 43 removes the present exception for the crime of murder. Notwithstanding the fact that under certain circumstances a life sentence is potentially available as an alternative sentence for murder (*State v. Anderson and Sabatino*, Nos. AD-78-37, 78-40 (Me. App. Div. June 30, 1980)), that fact alone should not foreclose to a trial court the discretion to continue the prosecution if a defendant in a murder case voluntarily absents himself or herself from the trial.

Advisory Committee Note—2003

[M.R. Crim. P. 43.] The amendment replaces the current indirect reference to a Class D or Class E crime with an express reference. The change conforms the language of Rule 43 with that of current Rule 10 addressing a permitted absence from an arraignment by a represented defendant when the charge is a Class D or Class E crime.

RULE 44. RIGHT TO AND ASSIGNMENT OF COUNSEL

(a) Assignment of Counsel.

When a defendant or a petitioner in a proceeding governed by these rules is without sufficient means to employ counsel and is entitled by law to appointment or assignment of counsel at state expense, such appointment or assignment shall be governed by Rules 44, 44A, 44B, and 44C.

(1) *Before Verdict.* If the defendant in a proceeding in which the crime charged is murder or a Class A, Class B, or Class C crime appears in any court without counsel, the court shall advise the defendant of the defendant's right to be represented by counsel at every stage of the proceeding unless the defendant elects to proceed without counsel. If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel. Assigned counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned. The Maine Commission on Indigent Legal Services will, pursuant to procedures established by the Commission, accept the initial assignment made by the court or

substitute other counsel for counsel assigned by the court. Counsel initially assigned by the court shall remain counsel of record unless the Commission does not accept the assignment and provides notice of substitution of counsel and counsel files a notice of withdrawal pursuant to Rule 44B, or counsel is otherwise granted leave to withdraw pursuant to Rule 44B.

If a defendant in a proceeding in which the crime charged is a Class D or Class E crime appears in any court without counsel, the court shall advise the defendant of the defendant's right to be represented by counsel at every stage of the proceeding unless the defendant elects to proceed without counsel. If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel, unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed. Assigned counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned. The Maine Commission on Indigent Legal Services will, pursuant to procedures established by the Commission, accept the initial assignment made by the court or substitute other counsel for counsel assigned by the court. Counsel initially assigned by the court shall remain counsel of record unless the Commission does not accept the assignment and provides notice of substitution of counsel or counsel is otherwise granted leave to withdraw under Rule 44B.

(2) *On Appeal.* Assigned counsel who represents a defendant in the District Court, the Superior Court, or a court with a unified criminal docket shall continue to represent the defendant on appeal unless relieved by order of the trial or appellate court.

The court may assign counsel to a defendant determined indigent after verdict or finding pursuant to Rule 44A.

(b) Determination of Indigency. The court shall determine whether a defendant has sufficient means with which to employ counsel and in making such determination may examine the defendant under oath concerning the defendant's financial resources. A defendant does not have sufficient means with which to employ counsel if the defendant's lack of resources effectively prevents the defendant from retaining the services of competent counsel. In making its determination the court shall consider the following factors: the defendant's income, the defendant's credit standing, the availability and convertibility of any assets owned by the defendant, the living expenses of the defendant and the defendant's dependents, the defendant's outstanding obligations, the financial

resources of the defendant's parents if the defendant is an unemancipated minor residing with his or her parents, and the cost of retaining the services of competent counsel.

If the court finds that the defendant has sufficient means with which to bear a portion of the expense of representation, it shall assign counsel to represent the defendant in accordance with subdivision (a)(1), above, but may condition its order on the defendant's paying to the court a specified portion of the counsel fees and costs of defense. When such a conditional order is issued the court shall enter an order stating its findings.

(c) Compensation of Counsel. Assigned counsel shall receive compensation for services performed and expenses incurred as assigned counsel pursuant to rates and standards established by the Maine Commission on Indigent Legal Services pursuant to 4 M.R.S. § 1804 (2), (3). Assigned counsel shall under no circumstances accept from the defendant or from anyone else on the defendant's behalf any compensation for services or costs of defense.

(d) Counsel appointed or assigned by the Court prior to the publication of rosters by the Commission. Counsel appointed or assigned by the court prior to the publication of rosters containing the names of attorneys designated by the Commission as eligible to receive assignments and those attorneys appointed or assigned prior to July 1, 2010, shall be deemed to be attorneys "designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned" in accordance with subdivision (a)(2), above. Counsel will maintain this status for purpose of the cases assigned by the court unless and until the Commission assigns substitute counsel. The Commission shall be responsible for compensation for services performed and expenses incurred by counsel appointed or assigned pursuant to this subdivision in accordance with subdivision (c) up to the time of substitution, withdrawal or completion of the case.

(e) Bar Registration Number. Any attorney representing a defendant shall provide the court with the attorney's Maine Bar Registration Number when entering their appearance.

Advisory Committee Note—1967

[M.R. Crim. P. 44.] 15 M.R.S. § 810 (1964), as amended, (Supp. 1965) provides: "The Superior or District Court may in any criminal case appoint counsel

when it appears to the court that the accused has not sufficient means to employ counsel." Maine Rule of Criminal Procedure 44 requires both the Superior Court and the District Court to appoint counsel in felony cases when a defendant does not have sufficient means to employ counsel. There was no provision in either the Maine Rules of Criminal Procedure or the Maine District Court Criminal Rules relative to the appointment of counsel in misdemeanor cases. There is still some question as to the constitutional right of a defendant to appointment of counsel in a misdemeanor case. In Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965), it was held that a defendant charged with a minor offense which could be punished by a $500 fine and 90 days in jail, was entitled to counsel. A California court has held that a defendant is entitled to counsel when charged with the offense of driving with a revoked license. In re Johnson, 62 Cal. 2d 325, 42 Cal. Rptr. 228, 398 P.2d 420 (1965), The New York Court of Appeals has held that a defendant charged with petty larceny is entitled to appointed counsel. People v. Witenski, 15 N.Y.2d 392, 259 N.Y.S.2d 413, 207 N.E.2d 358 (1965).

It is not clear that the holding in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733, on remand, Fla. Sup., 153 So. 2d 299 (1963), requires appointment of counsel in all criminal cases. [Compare, State of Connecticut v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752, cert. denied, 385 U.S. 982, 87 S. Ct. 526, 17 L. Ed. 2d 443 (1966) with Arbo v. Hegstrom, 261 F. Supp. 397 (D.C. D. Conn. 1966). See also People v. Mallory, 378 Mich. 538, 147 N.W.2d 66 (1967); Comment, Court Appointed Counsel for Indigent Misdemeanants, 6 Ariz.L.Rev, 280 (1965); Comment, The Indigent Defendant's Right to Counsel in Misdemeanor Cases, 19 Sw.L.J. 593 (1965)]. However, because of the Maine statute and because of the apparent trend of recent cases the rules have been amended to recognize the power of the court to appoint counsel in misdemeanor cases, leaving to the discretion of the court whether the power should be exercised. It is to be anticipated that the exercise of discretion would be dependent upon the seriousness of the misdemeanor offense involved.

Advisory Committee Note—1973

[M.R. Crim. P. 44.] Several problems relating to the appointment of counsel have been presented to the committee for its consideration. In order to deal with these problems the committee recommended substantial revision to Maine Rule of Criminal Procedure 44.

(a) Contains the prior provisions of Rule 44 with the addition of one paragraph. Many counsel appointed to represent defendants in the Superior Court

assume that their responsibility is fulfilled when the defendant has been sentenced. Many times a notice of appeal is filed without any petition being filed for the appointment of counsel to represent the defendant on the appeal and the time periods expire without any action being taken. The new paragraph added to Rule 44(a) is designed to make very clear that appointed counsel continues to represent the defendant until relieved by order of court or until new counsel is appointed. This places upon appointed counsel the direct responsibility to file a notice of appeal if the defendant desires it and to see that a petition for appointment of counsel is prepared for the defendant and presented to the court.

Subdivision (b) is intended to achieve some degree of uniformity in the standards for appointment of counsel. It first establishes a standard for what is meant by "sufficient means with which to employ counsel;" that standard being a realistic appraisal of whether the defendant has sufficient means with which to retain the services of competent counsel. For example, a defendant may be receiving a weekly salary which would permit him to pay a small sum weekly toward his counsel fees, but at the same time he may not have a sufficient sum available to him to permit him to retain counsel. The realities of the defense of criminal cases are that no attorney will accept the representation of a defendant in a criminal case unless he receives a retainer in advance. This factor must be considered by the court in determining whether to appoint counsel. On the other hand, the court may determine that the defendant is able to bear a portion of the expense and the technique of the conditional order employed in Rule 39A is now expressly made possible in Superior Court and District Court appointments in felony cases and in Superior Court appointments in misdemeanor cases.

(c) One of the major problems commented upon by members of the bar is the inadequacy of compensation of appointed counsel. The committee received the following resolution from the criminal law section of the Maine State Bar Association:

> The Criminal Law Section of the Maine State Bar Association urges the Criminal Rules Advisory Committee to present to the Supreme Judicial Court a rule or rules for the Supreme Judicial Court, the Superior Court and the District Court setting forth that Court appointed counsel be compensated at a fair and reasonable rate for necessary professional services which are tendered upon presentation of an itemized statement reflecting fully the professional services rendered the date and the time spent at the same, and necessary expenses but, in no event at a rate less than 25 dollars per hour.

The committee did not consider it appropriate to recommend to the court the adoption of a specified hourly rate, but did feel it was appropriate to adopt the principle that counsel should be adequately compensated and to enumerate in the rule the factors which the court should consider in determining the adequacy of compensation. The committee felt that the primary concern of the bar was with the fees paid in the District Court and in the Law Court.

The committee was also informed that on occasion court appointed counsel are receiving compensation directly from the defendant or from someone else on behalf of the defendant. In the opinion of the committee this is a completely inappropriate practice and should be specifically prohibited by the Rules. If the defendant has funds with which to pay a portion of his counsel fees the court can issue a conditional order and the portion which the defendant is able to pay should be paid directly to the court which can then fix the appropriate fee for appointed counsel.

Advisory Committee Note—1973

[M.R. Crim. P. 44(a).] Subdivision (a) is amended in the second paragraph to make it very clear that counsel appointed in the Superior Court continues to represent the defendant until relieved by order of court and either new counsel is appointed or the defendant enters an appearance pro se.

Advisory Committee Note—1976

[M.R. Crim. P. 44(a).] This amendment is to accommodate the abolition of the felony-misdemeanor distinction by the new Criminal Code, Title 17-A of the Maine Revised Statutes.

Advisory Committee Note—1977

Rule 44(a) of the Maine Rules of Criminal Procedure: See Note 1.

[1. Rule 7(a) of the Maine Rules of Criminal Procedure:

This amendment conforms the Rule to the re-introduction in the Criminal Code of the crime of murder, 17-A M.R.S. § 201, in lieu of the crimes of homicide in the first and second degree. P.L. 1977, c.510, § 38, effective October 24, 1977.]

Advisory Committee Note—1978

[M.R. Crim. P. 44.] The title of Rule 44 is amended to make clear that the right to counsel has two discrete aspects: (1) The right to retain counsel at the defendant's own expense and to be advised by the court of that right; and (2) The right to be assigned counsel at State expense if the defendant cannot afford to retain counsel and does not waive the right.

The amendment conforms the title to the title of Federal Rule of Criminal Procedure 44.

Rule 44(a) is amended to bring it into conformity with *Newell v. State*, 277 A.2d 731 (Me. 1971). In *Newell*, the Court required the appointment of counsel for all indigent defendants who are facing criminal charges which might result in the imposition of a penalty of imprisonment in excess of six months or of a fine of $500.00 or both. Under the Criminal Code the charge of a Class D crime might result in imprisonment for a period of up to one year. 17-A M.R.S. § 1252(2)(E), or in a fine (for a natural person) not to exceed $250.00, 17-A M.R.S. § 1301(1)(C) Neither penalty invokes the *Newell* criteria for appointment of counsel. Of course, counsel would have to be appointed if the judge contemplated a sentence of any period of imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

The provisions of the last sentence of Rule 44(a), governing withdrawal of appointed counsel, are transferred to Rule 63.

Advisory Committee Note—1979

[M.R. Crim. P. 44(a) and (d).] Rule 44(a) is amended to receive provisions on counsel on appeal from former Rule 39E. The intent of Rule 44(a)(2) is that a motion to relieve counsel on appeal should preferably be entertained by the Superior Court.

Rule 44(d) contains provisions transferred from Rule 39F for fees for defense counsel on a state appeal.

Advisory Committee Note—1980

[M.R. Crim. P. 44(d).] The provision of Rule 44(d) is now covered by statute, see Note 8, supra.

[8. Maine Rule of Criminal Procedure 37B:

Rule 37B is added to clarify and collect in one place the provisions pertaining to appeals by the state and to conform them to 15 M.R.S. § 2115-A, as repealed and replaced by 1979 Laws, c.343, § 2, effective September 14, 1979.

The provision for counsel fees for the defendant on appeals by the state is transferred from Rule 44(d) and simplified to conform to c.343, § 2.]

Advisory Committee Note—1989

[M.R. Crim. P. 44.] Rule 44(a)(1) provides that the assignment of counsel provisions apply in both Superior and District Courts. The duty of continuing representation from District Court to Superior Court is now covered in Rule 44(a)(2). The reference to Rule 39E in Rule 44(a)(2) is changed to Rule 44A.

A new Rule 44(d) is added reflecting the substance of former Rule 53A.

Advisory Committee Note—1990

[M.R. Crim. P. 44(a)(2).] Rule 44(a)(2) is amended to delete a reference to Superior Court. Both the District and Superior courts are authorized to appoint counsel for a defendant determined indigent after verdict or finding of guilty pursuant to Rule 44A.

Advisory Committee Note—1996

[M.R. Crim. P. 44(d).] The amendment eliminates the gender-specific pronoun.

Advisory Committee Notes—2001

[M.R. Crim. P. 44(d).] Rule 44(d) is the product of another age. It was promulgated before the adoption of the Code of Professional Responsibility and its comprehensive regulation of conflicts of interest. There is now an advisory committee on the Code and an extensive professional responsibility apparatus. It is to the Advisory Committee on Professional Responsibility that the matter covered

by Rule 44(d) should be entrusted. Moreover, the conduct of clerks of courts is now comprehensively regulated by administrative orders and personnel policies.

Advisory Note—July 2010

The amendments to M.R. Crim. P. 44(a), (b) and (c) make changes to subdivisions (a), (b) and (c) necessitated by the establishment of the Maine Commission on Indigent Legal Services (4 M.R.S. §§ 1801-1805 and 5 M.R.S. §§ 959 and 12004-G (25-A)), enacted by P.L. 2009, ch. 419. These changes reflect a transfer of responsibility for indigent legal services from the Judicial Branch to the independent Commission. *See* Emergency Preamble to P.L. 2009, ch. 419 and 4 M.R.S. §§ 1801 and 1804.

The statute implementing the Maine Commission on Indigent Legal Services explicitly references case types that fall under the Commission's purview, including criminal matters. *See* P.L. 2009, ch. 419 and 4 M.R.S. §§ 1801, 1802, and 1804. The initial paragraph of Rule 44, added by this amendment, clarifies that Rule 44 applies to all cases in which the court is authorized by law to appoint or assign counsel to represent a party at state expense in proceedings governed by the Criminal Rules. A separate amendment adopting a new Rule 88 of the Maine Rules of Civil Procedure incorporates M.R. Crim. P. 44, 44B, and 44C by reference into the Civil Rules to govern those civil actions in which counsel may be appointed and paid at state expense.

Addressing determination of indigency, which remains the responsibility of the court, subdivision (b) has three minor modifications. Specifically, the word "assign" is replaced by the word "appoint" because of the new statutory definition for "assigned counsel" (4 M.R.S. § 1802(1)); the word "competent" is deleted because attorneys designated by the Commission must be competent (4 M.R.S. §§ 1801 and 1804(2)(B) and (3)(E)); and a condition is added that the court's initial assignment be "in accordance with subdivision (a)(1)."

Subdivision (c) is substantially modified to reflect that the Commission rather than the Judicial Branch is now responsible for establishing rates of compensation for assigned counsel, including allowing reimbursement for expenses incurred by assigned counsel (4 M.R.S. § 1804(2)(F) and (3)(F)), and that the Commission rather than the Judicial Branch is now responsible for paying compensation and expenses to assigned counsel. (4 M.R.S. § 1804(3)).

If the court finds that a defendant has sufficient means with which to bear a portion of the expense of representation and conditions assignment of counsel upon payment to the court a specified portion of the counsel fees and costs of representation, the court will transfer funds collected to the Maine Commission on Indigent Legal Services. After an agreed period of transition, the Commission will be responsible for its own collection efforts.

In addition to the more significant amendments, the following changes have been made respecting subdivisions (a) and (c):

(1) Paragraph (1) of subdivision (a) has been broken up into two separate paragraphs to enhance clarity;

(2) A reference to "a court with a unified criminal docket" has been added to paragraph (2) of subdivision (a);

(3) The word "appointed" has been replaced with the word "assigned" in subdivision (c); and

(4) The current exception in subdivision (c) "except pursuant to court order" respecting the prohibition against assigned counsel accepting compensation for services or costs of defense from the defendant or anyone else on the defendant's behalf, has been deleted.

Advisory Note—July 2010

Rule 44(d) is a transition provision providing a procedural mechanism governing the shift of responsibility for assignment, designation and payment of counsel for indigent defendants during the transfer of responsibility for assigned counsel services from the Judicial Branch to the Maine Commission on Indigent Legal Services. It provides that those attorneys appointed or assigned by the court prior to the Commission's assuming responsibility for assignment and designation of counsel would be deemed designated for assignment to the cases to which they have been assigned by the court until the Commission has the mechanisms in place to assume responsibility these functions.

RULE 44A. PROCEDURE FOR DETERMINATION OF INDIGENCY AFTER VERDICT OR FINDING

(a) Petition and Hearing. A defendant who has filed notice of appeal and who claims to be without financial means to prosecute the appeal may, within 10 days following the filing of the notice of appeal, file a petition in the court in which the defendant was convicted requesting that the defendant be declared indigent. The petition shall be heard promptly. The clerk shall forthwith notify the clerk of the court to which the defendant has appealed of the filing of a petition pursuant to this rule.

(b) Order. If, after hearing, the court finds that the petitioner is without financial means with which to prosecute the appeal, it shall grant the relief requested. If, after hearing, the court finds that the petitioner has financial means with which to bear a portion of the expense of prosecuting the appeal, it shall grant the relief requested, but may condition its order on the petitioner's paying a portion of the expense of prosecuting the appeal. If, after hearing, the court finds that the petitioner has financial means with which to prosecute the appeal, the petition shall be denied.

When a conditional order is issued or when a petition is denied, the court shall file a decree setting forth its findings.

(c) Review. From the findings filed following the denial of a petition or the granting of a conditional order, the petitioner may, within 10 days after the filing thereof, appeal in writing to any justice of the Superior Court if the petition is denied in the District Court or to any justice of the Supreme Judicial Court if the petition is denied in the Superior Court. The justice, after notice to the attorney for the state, shall hear the matter de novo, and may affirm, modify or reverse the findings of the justice or judge below. If the findings are modified or reversed, the matter shall be remanded to the court below for appropriate action. The decision of the reviewing justice shall be final. During the pendency of this appeal the time periods for the perfection of the appeal on the merits shall not run, but shall commence to run upon final disposition of the petition. The clerk below shall forthwith notify the clerk of the court to which the defendant has appealed of such final disposition and the date of its entry.

Advisory Committee Note—1989

[M.R. Crim. P. 44A.] New Rule 44A contains the language of former Rule 39E.

Advisory Committee Note—1990

[M.R. Crim. P. 44A.] Rule 44A is amended to make clear that both the District and the Superior courts are authorized to appoint counsel for a defendant determined indigent after verdict or finding of guilty. The petition filed under Rule 44A is to be heard promptly by the court in which the petition has been filed.

RULE 44B. WITHDRAWAL OF COUNSEL

Counsel may withdraw from a case by serving notice of withdrawal on his or her client and the state and filing the notice, provided that such notice is accompanied by notice of the appearance of other counsel. In a case when counsel is assigned to represent an indigent defendant, the other counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case involved. Unless these conditions are met, counsel may withdraw from the case only by leave of court. A court order relieving assigned counsel does not become effective until either new counsel is assigned in accordance with Rule 44, subdivision (a)(1), or the defendant formally waives the right to be represented by counsel.

Advisory Committee Note—1989

[M.R. Crim. P. 44B.] New Rule 44B contains with minor alterations the language of former Rule 63. It also contains the requirement that counsel appointed in the District Court continue to represent a defendant until counsel is appointed in the Superior Court. This language is taken from Rule 44(a)(1).

Advisory Note—July 2010

The amendment to M.R. Crim. P. 44B modifies the Rule in five respects. First, a new condition for withdrawal of counsel assigned to represent an indigent defendant is added in the first sentence requiring that assigned replacement counsel "be designated by the Maine Commission on Indigent Legal Services to receive assignment for the type of case involved." *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

Second, the word "appointed" in the second sentence is replaced by the word "assigned." *Id.*

Third, in the same sentence assignment of new counsel must now be "in accordance with Rule 44, subdivision (a)(1)." *Id.*

Fourth, the phrase "be represented by counsel" has been added at the end of the second sentence for completeness.

Fifth, the final sentence of the Rule has been deleted as unnecessary.

RULE 44C. PROCEDURE FOR OBTAINING FUNDS FOR EXPERT OR INVESTIGATIVE ASSISTANCE FOR INDIGENT DEFENDANT

(a) Application to the Maine Commission on Indigent Legal Services.

A defendant found indigent or who claims to be without sufficient means to employ expert or investigative assistance necessary for his or her defense may file an application for funds to obtain expert or investigative assistance or both with the Maine Commission on Indigent Legal Services in accordance with procedures established by the Commission. Pending publication, by the Commission, of procedures for application for and approval of requests for funds for expert or investigative assistance, such requests shall be presented by motion to the court and considered in accordance with the provisions of this Rule 44C, as those provisions were in effect on June 30, 2010. The Commission shall be responsible for receipt and payment of all claims for payment of expert or investigative assistance received on or after July 1, 2010 when such expert or investigative assistance was authorized pursuant to the provisions of this Rule 44C as amended or as in effect prior to July 1, 2010.

Advisory Committee Note—1997

[M.R. Crim. P. 44C.] Some perplexity has been expressed by the bench and bar as to whether a motion by defense counsel for funds for investigative or expert assistance for an indigent defendant may be presented, heard and determined ex parte. An ex parte motion may not be presented "concerning the merits of a contested matter." Me. Bar. Rule 3.7(h)(2); if the prosecution is not given notice of the motion, there is no way to tell whether the motion is "contested." This circularity is repeated in the Maine Code of Judicial Conduct, which permits a

limited ex parte motion for "administrative purposes," subject to the prosecutor's right to a "reasonable opportunity to respond." Canon 3(B)(7)(a). The Justices of the Superior Court have stated that "some guidance from the Criminal Rules committee would be appropriate" (Letter of February 24, 1994 from Chief Justice Delahanty to District Attorney Mills)).

The Committee believes that the procedure for obtaining funds for expert or investigative assistance should be regularized in the rules and that a limited ex parte procedure should be authorized.

Subdivision (a) provides the grounds of the motion, while the remaining subdivisions provide a procedure for presenting an ex parte motion and for determining whether the motion should be heard and determined ex parte.

In an ex parte motion is granted, subdivision (d) provides that the court must "order the appropriate docket entry." As contemplated by the subdivision, to be appropriate the entry should at a minimum identify in general terms that a motion to employ expert or investigative assistance or both has been granted and should disclose the amount(s) authorized.

Advisory Committee Note—2003

[M.R. Crim. P. 44C(a)(1).] This amendment makes the paragraph gender neutral.

Advisory Note—July 2010

The amendment to M.R. Crim. P. 44C is necessitated by the establishment of the Maine Commission on Indigent Legal Services. *See* Advisory Note—July 2010 to M.R. Crim. P. 44. The changes reflect (subject to the necessary transition period addressed in this amendment) a transfer of responsibility for authorizing and funding expert and investigative assistance from the Judicial Branch to the Commission. *Id.*

In the context of obtaining funds for expert or investigative assistance by an indigent, Rule 44C is substantially modified to reflect that it is the Commission, rather than the Judicial Branch, that is now responsible both for paying for any such funds and for establishing the procedures to be used by indigent defendants for obtaining the needed funds.

During the transition period before the Commission publishes procedures to assume this responsibility, requests for this assistance should continue to be presented to the court by motion. Once this change in responsibility to approve and pay for investigative and expert assistance takes effect, the clerks of the trial courts will have no responsibility for docketing the attempted filing of motions requesting investigative or expert assistance and, in contrast to the provisions of M.R. Civ. P. 5(f) that pertains to filings not in compliance with statutes, rules or orders, the clerk will have no obligation to retain a copy of the attempted filing and notice.

Effective July 1, 2010, all claims for payment for performance of expert and investigative assistance must be presented to the Commission on Indigent Legal Services for payment. The Judicial Branch lacks the authority or the funds to make such payments after July 1, 2010.

RULE 45. TIME

(a) Computation. In computing any period of time, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

For the purpose of this subdivision legal holidays shall include days on which the clerk's office is closed pursuant to Rule 54.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect; however the court may not extend the time for taking any action under Rules 29, 33, 34, 35, 36, and 36B, except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by

the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to act in a criminal proceeding. This rule shall not affect the times at which a grand jury may be summoned nor shall it affect the limitations upon the power of bail commissioners.

(d) For Motions; Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 7 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than one day before the hearing unless the court permits them to be served at a later time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do any act within a prescribed period after the service of a notice or other paper upon the party and the notice or other paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Advisory Committee Note—1967

[M.R. Crim. P. 45(b).] The changes in Rule 45 are to accommodate numbering changes made in Rule 37 and Rule 39.

Advisory Committee Note—1973

[M.R. Crim. P. 45(b).] Subdivision (b) is amended to delete any reference to Rule 39 since the Superior Court no longer has any jurisdiction to grant extensions of time for filing the designation of contents of the record or for filing the record on appeal.

Advisory Committee Note—1975

[M.R. Crim. P. 45(b).] This amendment is intended to eliminate ambiguity and establish that appellate review of sentence provided for in Rule 40 must be sought within the time provided in that rule.

Advisory Committee Note—1983

[M.R. Crim. P. 45(b).] The amendment corrects an erroneous cross reference.

Supreme Judicial Court Note—1984

[M.R. Crim. P. 45(a) and (b).] Rule 45(a) is amended consistent with the simultaneous amendment of Rule 56 to substitute the Chief Justice of the Superior Court for the Chief Justice of the Supreme Judicial Court in the provision defining legal holidays. The amendment implements the delegation authority contained in 4 M.R.S. § 101A, enacted by 1983 Laws, c. 269, which created the position of the Chief Justice of the Superior Court. This and other simultaneous amendments are intended to give the Chief Justice of the Superior Court authority under the Maine Rules of Criminal Procedure parallel to that of the Chief Judge of the District Court under the District Court Criminal Rules. Both officials remain subject to the supervision of the Chief Justice of the Supreme Judicial Court. See 4 M.R.S. §§ 101A, 164.

Advisory Committee Note—1984

[M.R. Crim. P. 45(b).] The amendment adds subdivisions (c) and (d) of Rule 76 and subdivision (a) of Rule 88 to the list of exceptions to Rule 45(b). This corrects an oversight made at the time of their creation. Rule 76(c) is designed to function, to the extent possible, in the same manner as Rule 37. Rule 76(d) contains its own time-extending condition. Rule 88(a) mirrors 15 M.R.S. § 2l0-A (Supp. 1982), which makes no provision for extending the filing time.

Advisory Committee Note—1989

[M.R. Crim. P. 45(a) and (b).] Rule 45(a) is amended to change the reference from former Rule 56 to new Rule 54 and to make clear that the rule applies in both District and Superior Courts.

The reference in Rule 45(b) to the limitation on the court's discretion to extend the time for taking certain actions is amended to reflect the renumbering of some rules.

Advisory Committee Note—1996

[M.R. Crim. P. 45(b).] The amendment adds the reference to new Rule 37C to ensure that any enlargement of time is governed by Rule 37C rather than Rule 45(b).

Advisory Committee Note—2002

[M.R. Crim. P. 45(b).] Rules 37, 37C, 40, 76(e), 76(d) and 88(a) have been abrogated as a result of the Maine Rules of Appellate Procedure.

Advisory Note – June 2006

M.R. Crim. P. 45(b) and (e). The amendment relative to subdivision (b) replaces the colon following the word "reflect" with a semicolon and replaces the word "but" with the word "however" at the beginning of the independent phrase. The amendment relative to subdivision (e) replaces in the text spelled-out number "three" with its figure counterpart. *See* Advisory Note to M.R. Crim. P. 6(a) and (b)(2).

RULE 46. CERTAIN PROCEDURAL PROVISIONS GOVERNING BAIL

(a) In General. This rule contains certain procedural provisions governing bail for a defendant or for a witness. The procedure governing pre-conviction and post-conviction bail for a defendant is generally provided by statute.

(b) Bail by a Bail Commissioner.

(1) *Required Factual Endorsements Upon Written Release Order.* Every bail commissioner upon accepting bail shall endorse upon the written release order the following facts: the date and place (town or city) of accepting bail, the court before which the prisoner is required to appear, the crime or crimes of which the prisoner is accused, the amount and conditions of bail, the names and addresses of each surety or owner of cash bail, the prisoner's mailing address and, if different, residence address and, if known, the date and time the prisoner is to appear, the Arrest Tracking Number, the Charge Tracking Number, and the date of birth of the prisoner.

(2) *Inability of Person in Custody to Pay Bail Commissioner Fee.* A person presently in custody who is qualified to be released upon personal recognizance or upon execution of an unsecured appearance bond, whether or not accompanied by one or more conditions of bail that has been set by a judicial officer, but who in fact lacks the present financial ability to pay a bail commissioner fee, shall nonetheless be released upon personal recognizance or upon execution of an unsecured appearance bond. A bail commissioner shall not refuse to (A) examine a person to determine the person's eligibility for bail; (B) set bail; (C) prepare the personal recognizance or bond; or (D) take the acknowledgement of the person in custody, because a person in custody lacks the present financial ability to pay a bail commissioner fee.

(c) Bail Given on Appeal; Place of Deposit. Whenever cash or other property is given on appeal, it shall be deposited with the clerk of the trial court on the next regular business day.

(d) Review of Bail by or Appeal to a Single Justice of the Supreme Judicial Court.

(1) *Petition.* A petition for review of pre-conviction bail under 15 M.R.S. § 1029 shall be filed in the Superior Court. The clerk shall promptly deliver a copy of the petition to any Justice of the Supreme Judicial Court designated by a general order or special assignment of the Chief Justice to sit in single justice matters in that county. On receipt of the petition, the trial court's order and the available record of the hearing below, the assigned Justice will either conduct a hearing de novo or conduct a review, depending upon what is required under the law. Briefing and oral argument may be dispensed with by the assigned Justice.

(2) *Appeal.* An appeal of post-conviction bail under 15 M.R.S. § 1051, or an appeal of revocation of pre-conviction bail under 15 M.R.S. § 1097 or revocation of post-conviction bail under 15 M.R.S. § 1099-A shall be taken by filing a notice of appeal with the clerk of the Superior Court. The clerk shall promptly deliver a copy of the notice to any designated Justice of the Supreme Judicial Court. On receipt of the notice of appeal, the trial court's order and the available record of the hearing below, the assigned Justice shall review the record and, with or without briefing or argument, determine whether the trial court's order is without a rational basis.

(e) Statement to Person Offering Surety for a Defendant. Every judicial officer or clerk who accepts property, including money, as security for bail

shall first provide to the prospective surety the oral and written advice required under 15 M.R.S. § 1072-A(2) and (3) respectively, as well as a copy of the written release order pertaining to the defendant required under 15 M.R.S. § 1072-A(1).

(f) Forfeiture.

(1) *Declaration.* If there is a breach of condition of a bond, the court shall declare a forfeiture of the bail and give prompt notice to the obligors.

(2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.* When no motion to set aside a forfeiture has been made within 30 days of notice of the declaration of forfeiture, the court shall enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the court and their liability may be enforced on motion without the necessity of an independent action.

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) Exoneration. When the condition of the bond has been satisfied, the court shall exonerate the obligors and release any bail.

(h) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure that person's presence by subpoena, the court may order the arrest of that person and may require that person to give bail for his or her appearance as a witness. If the person fails to give bail the court may commit that person to the custody of the sheriff pending final disposition of the proceeding in which the testimony is needed, may order that person's release if he or she has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been taken the court may discharge the witness.

Advisory Committee Note—1965

[M.R. Crim. P. 46(d).] There is no Advisory Committee Note to the amendment to Rule 46(d) effective December 1, 1965. However, the following notation was made in Glassman, at 403: "This change was necessitated by the failure of the Legislature to adopt a proposed Bail Jumping Statute, L.D. No. 1118, 102nd Legislature, 1965."

Advisory Committee Note—1979

[M.R. Crim. P. 46(a).] The amendment incorporates provisions on bail pending appeal previously found in Rule 38 and provides for bail on appeal to be set by the preceding Justice prior to the filing of a notice of appeal.

Advisory Committee Note—1980

[M.R. Crim. P. 46(a) and (d).] Provisions dealing with bail pending appeal are split out from Rule 46 and collected in a new Rule 46A, thereby aiding clarification of the subject.

Rule 46(d) is amended to make it clearer that a bail bond may either be secured or unsecured.

Advisory Committee Note—1983

[M.R. Crim. P. 46.] Maine Rules of Criminal Procedure 46, 46A, 46B, 46C and 46D:

The amendments seek to clarify which bail rule applies to which time interval and to make certain other clarifying revisions.

In *Fredette v. State*, 428 A.2d 395, 398 n.6 (Me. 1981) the Court expressed some uncertainty over which bail rule applies to which time interval. The amendment seeks to make clear that Rule 46 governs pre-verdict bail and that Rule 46A governs post verdict bail.

Post-verdict bail set by the Superior Court may be pending imposition or execution of sentence or entry of judgment or appeal. Once a judgment is entered, a defendant aggrieved by the Superior Court's decision on bail pending appeal may

apply for bail pending appeal to a single justice of the Supreme Judicial Court. In order to clarify these aspects of post-verdict bail, present Rule 46A has been split into two Rules, Rules 46A and 46B.

Revocation of post-verdict bail set pursuant to either Rule 46A or 46B is governed by new Rule 46C, which is drawn from present Rule 46A(e).

The provisions for forfeiture and exoneration of bail presently found in Rule 46(e) and (f) are meant to apply to both pre-verdict and post-verdict bail. Therefore, they are split off as a new Rule 46D.

Advisory Committee Note—1989

[M.R. Crim. P. 46.] Rule 46 has been substantially reorganized and now incorporates the language formerly found in former Rules 46A, 46D, and the last two sentences of former Rule 15(a). It is anticipated that Rule 46 will be rewritten in 1989 in light of the adoption of the Maine Bail Code (15 M.R.S. §§ 1001-1102).

Advisory Committee—1991

[M.R. Crim. P. 46(e)(1) and (3).] The proposed amendment reverses the burden of filing a motion once a declaration of forfeiture of bail is entered. Under the present rule the state must file a motion to reduce the declaration to a judgment, necessitating notice and hearing. The amendment requires notice of the declaration of forfeiture to the obligors and requires them to file a motion to set aside the forfeiture in order to prevent the entry of judgment. This should reduce delay and unnecessary paperwork, and make the process similar to that of a civil default. See Rule 55 of the Maine Rules of Civil Procedure.

Advisory Committee Note—1998

[M.R. Crim. P. 46(b).] This amendment conforms the rule to the language and current practice under the Bail Code.

[M.R. Crim. P. 46(d).] This amendment, added by the Supreme Judicial Court, is intended to broaden the current rule to include review of preconviction and post-conviction bail, including the revocation of preconviction and post-conviction bail, by a single Justice of the Supreme Judicial Court as statutorily authorized in the Maine Bail Code. 15 M.R.S. § 1029(1)(B) allows a defendant who is in custody following a Harnish bail proceeding conducted in the Superior

Court to petition a single Justice for review. 15 M.R.S. § 1051(5) and (6) allow either party aggrieved by a trial court's post-conviction bail order to appeal to a single Justice. 15 M.R.S. § 1097(3) allows a defendant in custody as a result of the revocation of pre-conviction bail conducted in the Superior Court to appeal to a single Justice. 15 M.R.S. § 1099-A(2) allows a defendant in custody as a result of the revocation of a post-conviction bail conducted in either the District or Superior Court to appeal to a single Justice. The amendment also intends that Rule 46(d) apply as well to a petition for writ of habeas corpus initiated by a defendant in custody following a pre-conviction bail hearing conducted in the Superior Court. A defendant similarly aggrieved in the District Court must instead seek review from a Justice of the Superior Court. *State v. Argraves*, 666 A.2d 79, 81 (Me. 1995).

[M.R. Crim. P. 46(e), (f) and (g).] Present Rules 46(e), (f) and (g) are redesignated to accommodate new Rule 46(e).

[M.R. Crim. 46(e).] This new rule responds to the recent enactment of 15 M.R.S. § 1072-A (Maine Bail Code) requiring that "the Supreme Judicial Court . . . by rule specify who is responsible for providing to the prospective surety the required oral and written advice as well as the copy of the written release order pertaining to the defendant." *See* P.L. 1997, ch. 543, § 17; Comm. of Conference Amend. A to L.D. 1571, No. S-423, Summary, paragraph number 13 (118th Legis. 1997).

[M.R. Crim. P. 46(g).] This newly redesignated rule is amended to delete matter now covered by the Bail Code.

[M.R. Crim. P. 46(h).] This newly redesignated rule is amended to expressly recognize the right of a court to arrest a material witness upon a proper showing, now legislatively authorized in the Bail Code (15 M.R.S. § 1104). *See* P.L. 1997, ch. 317, § A-2; L.D. 1490 Summary at page 3 (118th Legis. 1997).

Advisory Committee Note—2003

[M.R. Crim. P. 46(b).] The amendment deletes the current requirement that the written release orders have endorsed upon it, if known, the "incident number assigned by the arresting officer" because the "Arrest Tracking Number" and "Charge Tracking Number" will serve as the unique identifiers. *See* Advisory Committee Note to M.R. Crim. P. 3(f) and M.R. Crim. P. 7(f). *See also* Advisory Committee Note to M.R. Crim. P. 53(a) and M.R. Crim. P. 57.

Advisory Note – November 2006

The amendment to M.R.Crim.P. 46(b), in addition to modifying its heading, creates two separate numbered paragraphs in subdivision (b). Paragraph (1), captioned "Required Factual Endorsements Upon Written Release Order" contains the content of current subdivision (b). New paragraph (2) captioned "Inability of Person in Custody to Pay Bail Commissioner Fee" precludes a bail commissioner from refusing to take the steps necessary to release a person from custody upon personal recognizance or upon execution of an unsecured appearance bond, whether or not accompanied by one or more conditions that has been set by a judicial officer, merely because the person lacks the financial ability to pay a bail commissioner fee. A person in custody under these circumstances must be released by a bail commissioner upon personal recognizance or upon execution of an unsecured appearance bond.

RULE 47. MOTIONS AND MOTION DAY

(a) Motions. An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made, the rule or statute invoked if the motion is brought pursuant to a rule or statute, and the relief or order sought. It may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(b) Motion Day. Unless local conditions make it impracticable, the Chief Justice of the Superior Court and the Chief Judge of the District Court shall establish for each county and division regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time or place and on such notice, if any, as it considers reasonable may make orders for the advancement, conduct and hearing of actions.

To expedite its business or for the convenience of the parties, the court may make provision for the submission and determination of motions without oral hearing upon brief written statements of the reasons in support and opposition.

(c) Motion for Enlargement of Time or for Continuance. Any party filing a motion for enlargement of time to act under these rules or for a

continuance, except a continuance addressed in Rule 25A, shall file with the motion a statement indicating whether the motion is opposed or unopposed. If the position of the other party or parties cannot be ascertained, notwithstanding reasonable efforts, that shall be stated. The fact that a motion is unopposed does not assure that the requested relief will be granted.

(d) Nontestimonial Hearings Using Audio or Video Equipment. The use of telephone, audio or video conference equipment is encouraged for nontestimonial hearings and scheduling matters. A party may request this use or the court may act upon its own initiative. The court shall direct the terms of use, and, except when only scheduling matters are to be discussed, the court shall attempt to assure that the hearing is recorded by the best practicable means.

Advisory Committee Note—1977

[M.R. Crim. P. 47(b).] This amendment gives authority to the Chief Justice of the Supreme Judicial Court or his designee, usually a regional presiding justice, to establish in each county times and places for hearing on motions.

Advisory Committee Note—1986

[M.R. Crim. P. 47(b).] The amendment to paragraph (b) is needed to reflect the delegation in 4 M.R.S. § 110 to the Chief Justice of the Superior Court of the authority to establish the times and places for holding court.

Advisory Committee Note—1987

[M.R. Crim. P. 47(a).] The amendment borrows from the Civil Rules the requirement that a motion state with particularity "the rule or statute invoked if the motion is brought pursuant to a rule or statute." M.R. Civ. P. 7(b)(1). The requirement augments the precision and clarity of motion practice.

Advisory Committee Note—1994

[M.R. Crim. P 47(c).] New subdivision (c) is added to facilitate the handling of motions for enlargement of time or for a continuance by ensuring that the clerks and courts are aware of the positions of all parties on the relief requested in the motion. The language of this paragraph is drawn from Rule 7(b)(4) of the Maine Rules of Civil Procedure.

Advisory Note – June 2006

M.R. Crim. P. 47(c). The amendment clarifies that a motion for continuance of trial is no longer addressed by way of subdivision (c). Instead, it is now addressed in comprehensive new Rule 25-A that became effective January 1, 2006. *See* Me. Rptr., 873-890 A.2d CXLV – CXLVIII.

Advisory Note – 2008

M.R.Crim.P. 47(d). The amendment adds a new subdivision (d) to Rule 47 addressing nontestimonial hearings conducted by telephone, audio or video equipment. The rule encourages the use of telephone, audio or video conference equipment for nontestimonial hearings and scheduling matters. This use should serve both to expedite the court's business and to enhance the convenience of the parties, goals already sought with respect to the resolution of motions in Rule 47(b). When employing telephone calls or audio or video conference equipment for nontestimonial hearings other than scheduling matters the court should attempt to assure recording by the best practicable means.

The rule does not address proceedings in which the defendant's presence is required by Rule 43. The inapplicability of this rule to proceedings in which the defendant's presence is required by Rule 43 does not suggest that the use of telephone, audio or video conference equipment is prohibited in such proceedings. Authorization for use of telephone, audio or video conference equipment for arraignments, trials and testimonial hearings must be found in the court's inherent authority to control the conduct of the proceedings or in other rules. *See, e.g., Maryland v. Craig,* 497 U.S. 836, 860 (1990); *State v. Twist,* 528 A.2d 1250, 1255-58 (Me. 1987); M.R. Crim. P. 5(a) & 5C(a); M.R. Evid. 611.

RULE 48. DISMISSAL

(a) By the Attorney for the State. The attorney for the state may file a written dismissal of an indictment, information or complaint or any count of an indictment, information or complaint, setting forth the reasons for the dismissal and the prosecution relating to that dismissal shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By the Court.

(1) If there is unnecessary delay in bringing a defendant to trial, the court may upon motion of the defendant or on the court's own motion dismiss the indictment, information or complaint. The court shall direct whether the dismissal is with or without prejudice.

(2) If no indictment has been returned by the grand jury within 6 months of the initial appearance of the defendant or after the 3rd regularly scheduled session of the grand jury after the initial appearance, whichever occurs first, the clerk shall enter a dismissal of the complaint, unless within the time period specified in this paragraph the attorney for the state moves to enlarge the period and shows the court good cause why the complaint should remain on the docket. The dismissal pursuant to this paragraph shall be without prejudice.

(c) Filing. [Abrogated]

Advisory Committee Note—1980

[M.R. Crim. 48(a).] Rule 48(a) is amended to reflect the policy judgment that dismissal, as well as initiation, of prosecution is a matter within prosecutorial discretion and should not require court approval.

Advisory Committee Note—1983

[M.R. Crim. P. 48(b).] The amendment codifies the suggestion made in *State v. Wells*, 443 A.2d 60, 64 (Me. 1982) that the court "should take care to enter an order of dismissal under Rule 48(b) which makes clear whether the order is intended as a final termination of all prosecution on that charge."

Advisory Committee Note—1991

[M.R. Crim. P. 48(c).] This rule formalizes the alternative of filing a charge for a definite period of time instead of going forward with it in the usual course. Court approval is unnecessary unless the attorney for the state seeks assessment of costs. The written consent of the defendant to the filing is required to avoid the later assertion of the defendant's right to a speedy trial in the event the pleading is ultimately brought forward by the attorney for the state for action. In general, a filing will be used by an attorney for the state as an alternative to dispose of a case in which a conviction may not be an appropriate or attainable disposition. On

occasion conditions will be imposed on the defendant as part of the agreement to file the case. In those cases it would be in the interest of all parties to put those conditions in writing. Most cases will not be brought forward by the attorney for the state after filing. However, that option is available to the attorney for the state during the period of filing. If the attorney for the state does not act during the period of filing, a dismissal of the charge without prejudice will be entered by the clerk of court.

Advisory Committee Notes—2001

[M.R. Crim. P. 48(c).] This amendment is intended to resolve the issue whether the assessment of costs for a filing must reflect actual court costs. *See State v. Fixaris*, 327 A.2d 850, 853 n.2 (Me. 1974). Under this amendment, only assessment of costs in excess of $500 will require that a court make a finding that the monetary figure proposed reflects actual costs. Proposed assessed costs of a lesser amount will not necessitate this finding, nor does that monetary figure necessarily reflect actual court costs.

Advisory Committee Note – March 2005

[M.R. Crim. P. 48(b).] The amendment removes the reference to bind-over proceeding. *See also* Advisory Committee Note to M.R. Crim. P. 3(a) and (b).

Advisory Committee Note – June 2005

[M.R. Crim. P. 48(b).] Rule 48(b), as revised by the order of March 24, 2005, is further amended in several respects. First, the rule is divided into two sections. Subparagraph (1) of the revised rule is identical to the provision of the current rule relating to unnecessary delay in bringing a matter to trial in either the District Court or the Superior Court. Where such unnecessary delay is identified, the court may, upon motion of a defendant, dismiss an indictment, information or complaint. Where the court undertakes such a dismissal, the court is to direct whether the dismissal is with or without prejudice.

Subparagraph (2) of the revised rule provides that if no indictment is found by the grand jury within six months of the filing of the complaint or after the 3rd regularly scheduled session of the grand jury after the filing of the complaint, whichever occurs first, the clerk shall dismiss the complaint unless the attorney for the state shows the court good cause why the complaint should remain on the docket. Any dismissal pursuant to subparagraph (2) is without prejudice.

The entry of a dismissal by the clerk pursuant to subparagraph (2) will be automatic. Neither party will receive advance notice of the dismissal. It will be the responsibility of the attorney for the state to keep track of cases that have commenced and either assure timely presentation to the grand jury or, if there exists good reason to retain the case on the docket beyond the time constraints specified in the subparagraph, to bring a timely motion and demonstrate to the court good cause why the case should remain on the docket. This amendment establishes a time certain within which action shall be required by the grand jury. It is part of a process to develop certain times for actions to occur in the Superior Court once a prosecution has commenced.

It remains the better practice, notwithstanding the time periods specified in subparagraph (2) within which to indict after the filing of a complaint, that the attorney for the state present the case of an incarcerated defendant to the next regularly scheduled session of the grand jury after the filing of a complaint, if practicable.

Advisory Note – 2007

M.R.Crim.P. 48(b)(2). The amendment replaces the current "filing of a complaint" with the date of the "initial appearance of the defendant" as the 6-month triggering mechanism. The filing of a complaint can predate the initial appearance by many weeks. The parties generally do not engage in meaningful case resolution discussions until the initial appearance, regardless of when the complaint is filed. The amendment seeks to ensure that the parties have opportunity for discussion during the entire 6-month period.

Advisory Note – 2009

M.R.Crim.P. 48(c). Subdivision (c) of Rule 48 is abrogated. *See* Advisory Note to M.R.Crim.P. 11B.

Advisory Note – March 2010

M.R. Crim. P. 48(b) heading, (1) and (2). The amendment modifies subdivision (b) in three respects. First, the heading is changed from "By Court" to "By the Court." Second, paragraph (1) of subdivision (b) is expanded to allow a trial court on its own motion to dismiss a charging instrument "[i]f there is unnecessary delay in bringing a defendant to trial." Prior to this change, paragraph

(1) permitted a dismissal only upon motion of the defendant. Paragraph (1) is designed to be the mechanism to enforce a defendant's speedy trial right as provided by Me. Const. art. I, § 6 and U.S. Const., amend. VI and XIV. *State v. Caulk,* 543 A.2d 1366, 1369-70 (Me. 1988). Third, paragraph (2) of subdivision (b) is amended to clarify that to avoid dismissal of the complaint by the clerk, the attorney for the state must, prior to the expiration of the time period specified in paragraph (2), both move to enlarge the period and show the trial court good cause why the complaint should remain on the docket.

RULE 49. SERVICE AND FILING OF PAPERS

(a) Service: When Required. Written motions other than those which are heard ex parte, written notices, designations of the record on appeal and similar papers shall be served upon each of the parties.

(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of Orders. Immediately upon entry of an order made on a written motion subsequent to arraignment the clerk shall mail or deliver to each party a notice thereof and shall make a note in the docket of the mailing or delivery.

(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions. All court notices in a case will be sent to the attorney for the state who has been designated by the District Attorney or Attorney General to receive notices from a court. Changes in designations of attorneys to receive notice must be filed with the Office of Information Technology. If an attorney for the state other than the designee has entered their appearance and wishes to receive notice, that attorney must make arrangements with the court by filing an appropriate request in the case notice with the attorney's Maine Bar Registration Number.

(e) Form of Papers. All papers filed with the court may be typewritten, printed or otherwise duplicated upon opaque, unglazed paper 8 1/2 X 11 inches in size. The typed or printed matter must be double spaced except for quotations, headnotes and footnotes and must be legible. All typed or printed matter must

appear in at least 12 point type, except that footnotes and quotations may appear in 11 point type. Only one side of the paper may be used. Each paper shall contain a caption setting forth the name of the court, the county or location in which the action is pending, the docket number, the title of the case, and a brief descriptive title of the paper.

Advisory Committee Note—1976

[M.R. Crim. P. 49(e).] This new provision results from a continued discussion among the members of both the Civil Rules Advisory Committee and the Criminal Rules Advisory Committee relating to the size of paper used in pleadings. The preparation of records on appeal would be much cheaper and much faster if the same size paper were used in the Superior Court as is used in the Law Court, since then the pleadings and other papers filed with the Court could be photocopied to make up the record rather than having to be retyped from the large legal size paper which is customarily used now and reduced to the 81/2 x 11 paper which is required in the Law Court. It was jointly agreed that on an experimental basis a rule requiring that smaller paper be used be recommended for adoption in the criminal rules with an effective date approximately one year after promulgation in order to permit the various clerks to use up forms which have already been printed. This should result in substantial savings to the taxpayer, since in many indigent appeals it is the county or state which pays for the cost of preparation of the record on appeal. Other than the specific reference to the size of the paper the other matters in Rule 49(e) merely reflect existing practice. By virtue of the incorporation of Rule 49 of the Maine Rules of Criminal Procedure in the District Court Rules through Rule 49 of the District Court Criminal Rules the 81/2 x 11 inch size paper will also be required in criminal proceedings in the District Court.

Advisory Committee Note—1989

[M.R. Crim. P. 49(e).] Rule 49(e) is amended to delete the references to Rules 39B(g) and 39C(b).

Advisory Committee Notes—2000

[M.R. Crim. P. 49(e).] This amendment replaces “district and division” with the word “location” since the District Court is now identified in a caption by the place it is sitting. As to the other changes made in this amendment, *see* Advisory Committee Note to M.R. Crim. P. 39B(g) and 39C(b).

Advisory Committee Note—2002

[M.R. Crim. P. 49(e).] The amendment requires that footnotes and quotations appear in 11 point type to conform it to M.R. Civ. P. 7(f) and M.R. App. P. 10(d).

Advisory Committee Note—2003

[M.R. Crim. P. 49(d).] This amendment adds the Attorney General as a designator in addition to a District Attorney since criminal cases are generated out of both a District Attorney office and the office of the Attorney General.

RULE 50. CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter, while the appeal is pending may be so corrected with leave of the appellate court.

Advisory Committee Note—1989

[M.R. Crim. P. 50.] New Rule 50 contains with minor modifications the language of former Rule 36.

RULE 51. EXCEPTIONS UNNECESSARY

Exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the party's grounds therefor; but if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

RULE 52. HARMLESS ERROR AND OBVIOUS ERROR

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Obvious Error. Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

RULE 53. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) Criminal Docket. The clerk shall keep the criminal docket and shall enter therein each criminal proceeding. Proceedings shall be assigned docket numbers. Upon the filing of an indictment, information or complaint with the court, the first and last name and middle initial, and, if known, the State Identification Number, the Arrest Tracking Number, the Charge Tracking Number, date of birth and address of the defendant shall be entered upon the docket. Thereafter the name and address of the attorney appearing for any defendant shall be entered. All papers filed with the clerk, all appearances, pleas, motions, orders, verdicts, findings and judgments shall be noted chronologically upon the docket and shall be marked with the docket number. The notations shall briefly show the nature of each paper filed, writ issued, plea entered, or motion made and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date of the judgment or order, the date the judgment or order was received by the clerk and the date the notation is made.

(b) Custody of Papers by Clerk. The clerk shall be answerable for all records and papers filed with the court, and they shall not be taken from the clerk's custody without special order of the court; but the parties may at all times have copies.

(c) Other Books and Records. The clerk shall keep such other books and records as may be required from time to time by the Chief Justice of the Superior Court or the Chief Judge of the District Court.

Advisory Committee Note—1983

[M.R. Crim. P. 53.] Rule 55(b) had implemented a statutory provision which has now been repealed. See 4 M.R.S. § 564, as amended.

Advisory Committee Note—1986

[M.R. Crim. P. 53.] The amendment is needed to reflect that the Chief Justice of the Supreme Judicial Court has delegated to the Chief Justice of the Superior Court the authority to designate the books and records to be maintained by Superior Court clerks.

Advisory Committee Note—1989

[M.R. Crim. P. 53.] New Rule 53 contains with minor modifications the language of former Rule 55. Former Rule 53 has been deleted as the issue is governed by the Administrative Order in Regard to Photographic and Electronic Coverage of the Courts, effective 4/2/82 and amended 3/14/83 and 3/13/84.

Advisory Committee Note—2003

[M.R. Crim. P. 53(a).] This amendment deletes the current requirement that each original proceeding be assigned a "Universal Tracking Number" because the "Arrest Tracking Number" and "Charge Tracking Number" will serve as the unique identifiers. The amendment also directs that the "Arrest Tracking Number" and "Charge Tracking Number" be entered upon the docket, if known. *See* Advisory Committee Note to M.R. Crim. P. 3(f) and M.R. Crim. P. 7(f). *See also* Advisory Committee Note to M.R. Crim. P. 57.

RULE 53A. CUSTODY OF NONDOCUMENTARY EXHIBITS.

(a) During Trial or Hearing. During trial or hearing the clerk shall retain custody of all nondocumentary exhibits offered in evidence, whether admitted or excluded.

(b) After Trial or Hearing. At the conclusion of trial, counsel and self-represented parties shall, to the extent practicable, make arrangements for the withdrawal of any nondocumentary exhibit from the custody of the clerk. If it is necessary to preserve any exhibit for purposes of appeal, counsel and self-represented parties shall, whenever possible, arrange for a photograph of the exhibit. If no substitution is made for a bulky exhibit, the appellant is responsible for its transportation.

(c) After Final Determination. After the final determination of any action, any remaining nondocumentary exhibit shall be removed from the custody of the clerk by the offering party, unless otherwise ordered by the court. If any such exhibit is not so removed within 60 days after final determination, the clerk may, after 14 days' notice to the offering party, dispose of the exhibit in a reasonable manner, including transfer to the State for disposition as abandoned property.

Advisory Note – June 2006

M.R. Crim. P. 53A. The amendment incorporates in the rule the provisions of Administrative Order JB-05-23, *Marking, Removal, and Disposal of Exhibits in Criminal Actions*, effective August 1, 2005, that deal with the custody of nondocumentary exhibits during or after trial or hearing. Although the term "nondocumentary exhibits" is not defined in this new rule, the term "documentary exhibits" is described in Rule 6(b) of the Maine Rules of Appellate Procedure. *See also* M.R. Crim. P. 36C(b).

RULE 54. COURTS AND CLERKS

(a) Court Always Open. The court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders.

(b) Clerk's Office. The clerk's office with the clerk or a deputy in attendance shall be open during such hours as the Chief Justice of the Superior Court or the Chief Judge of the District Court may designate on all days except Saturdays, Sundays, and legal holidays, and except such other days as the Chief Justice of the Superior Court or the Chief Judge of the District Court may designate.

Supreme Judicial Court Note—1984

[M.R. Crim. P. 54.] Rule 56 is amended to substitute the Chief Justice of the Superior Court for the Chief Justice of the Supreme Judicial Court as the official empowered to set the office hours of the clerk's office and designate days when it may close. The amendment implements the delegation authority contained in 4 M.R.S. § 101A, enacted by 1983 Laws, c. 269, which created the position of Chief Justice of the Superior Court. This and other simultaneous amendments are intended to give the Chief Justice of the Superior Court authority under the Maine

Rules of Criminal Procedure parallel to that of the Chief Judge of the District Court under the District Court Criminal Rules. Both officials remain subject to the supervision of the Chief Justice of the Supreme Judicial Court. See 4 M.R.S. §§ 101A, 164.

Advisory Committee Note—1989

[M.R. Crim. P. 54.] New Rule 54 contains with minor modifications the language of former Rule 56. The language of former Rule 54(a) and (b) has been relocated to Rule 1 with modification and some deletions. Former Rule 54(c) has been deleted with the exception of the definition of "oath," which is now found in Rule 3(b).

RULE 55. VISITING LAWYERS

(a) In General. Any member in good standing of the bar of the highest court of any other state or of the District of Columbia may at the discretion of the court, on motion by a member of the bar of this state who is actively associated with a member of such other bar in a particular action, be permitted to practice in that action. The court may at any time for good cause revoke such permission without hearing. An attorney so permitted to practice in a particular action shall at all times be associated in such action with a member of the bar of this state, upon whom all process, notices and other papers shall be served and who shall sign all papers filed with the court and whose attendance at any proceeding may be required by the court.

(b) Appearances by Service Lawyers. With the written authorization (which may be general and not confined to a particular case) of the senior legal officer of any one of the armed services on active duty within the service district which includes this state, a member of the bar of any other state or of the District of Columbia on active duty with that armed service may appear in court in this state to represent, in defending against charges of Class D or Class E crimes, enlisted personnel on active duty of pay grades of E-4 and below who might not otherwise be able to afford proper legal assistance and who consent to such representation. A copy of each such written authorization by the senior legal officer shall be filed with the Clerk of the Law Court.

Advisory Committee Note—1967

[M.R. Crim. P. 55.] Rule 61 is new and is exactly the same as recently adopted Maine Rule of Civil Procedure 89.

Advisory Committee Note—1987

[M.R. Crim. P. 55.] M.R. Crim. P. 61(a). The amendment makes clear that members of the bar of the District of Columbia may be admitted to practice *pro hac vice* in criminal cases and conforms the language of Rule 61(a) to that of its civil counterpart, M.R. Civ. P. 89(b). The amendment also adds a title to Rule 61(a).

[M.R. Crim. P. 61(b).] The amendment recognizes the abolition of the felony-misdemeanor distinction by Maine's Criminal Code.

Advisory Committee Note—1989

[M.R. Crim. P. 55.] New Rule 55 contains the language of former Rule 61. The language of former Rule 55 is now found in Rule 53.

RULE 56. LEGAL ASSISTANCE BY LAW STUDENTS

(a) Permitted Activities on Behalf of a Criminal Defendant. An eligible law student may appear in court in this state, on behalf of any indigent receiving legal services through an organization providing legal services to the indigent, which organization has been approved by the Supreme Judicial Court, if the person on whose behalf the student is appearing has indicated in writing consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance, in the following proceedings:

(1) Any criminal proceeding in which the defendant does not have the right to the assignment of counsel under any constitutional provision, statute or rule. In such cases the supervising lawyer is not required to be personally present in court if the person on whose behalf the appearance is being made consents to the supervising lawyer's absence.

(2) Any criminal proceeding in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule. In such cases the supervising lawyer shall be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

(3) Any post-conviction review proceeding. In such cases the supervising lawyer shall be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

(b) Permitted Activities on Behalf of the State. An eligible law student may appear in any criminal proceeding on behalf of the state with the written approval of the prosecuting attorney or the authorized representative of the prosecuting attorney. If the defendant in a criminal proceeding has a right to counsel under any constitutional provision, statute or rule and is represented by counsel in that criminal proceeding, the prosecuting attorney or the authorized representative of the prosecuting attorney is required to be personally present throughout the proceeding and shall be fully responsible for the manner in which it is conducted.

(c) Written Consent and Approval. In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the court.

(d) Other Conditions. The provisions of Maine Rules of Civil Procedure 90(b), (c), (d), (e), (f), and (g), are hereby incorporated in this rule.

Advisory Committee Note—1981

[M.R. Crim. P. 56.] The amendment conforms the terminology of the Rule with that presently found in 15 M.R.S. ch. 305-A.

Advisory Committee Note—1989

[M.R. Crim. P. 56.] New Rule 56 contains the language of former Rule 62. The language of former Rule 56 is now found in Rule 54.

RULE 57. DEFINITIONS

Unless otherwise specified, the following words or variants shall have the following meanings:

(a) Arrest Tracking Number (ATN). "Arrest Tracking Number" or "ATN" is a unique identifier for a formal action undertaken by a criminal justice agency that initiates criminal charges. If the criminal justice agency initiating

criminal charges is a law enforcement agency, the formal action required is the custodial arrest and fingerprinting of the individual or the issuance or delivery to the individual of a Uniform Summons and Complaint. If the criminal justice agency initiating criminal charges is a prosecutorial office (District Attorney office or office of the Attorney General), the formal action is the filing of a complaint, the return of an indictment by a grand jury, or the filing of an information relative to an individual. The ATN is a seven-character alphanumeric field consisting of six numbers followed by one letter. The ATN is assigned by the Maine State Police upon the request of a criminal justice agency. A request must be made through the Maine Telecommunications and Radio Operations (METRO) system. The following criminal charges do not require an ATN: any Class D or Class E crime in Title 12 or Title 29-A other than a Class D or Class E crime involving hunting while under the influence of intoxicating liquor or drugs or with an excessive blood-alcohol level, or the operation or attempted operation of a watercraft, all-terrain vehicle, snowmobile or motor vehicle while under the influence of intoxicating liquor or drugs or with excessive blood-alcohol level.

(b) Attorney for the State. "Attorney for the state" means the Attorney General, any authorized full-time or part-time deputy attorney general, assistant attorney general or staff attorney; a district attorney, any authorized full-time or part-time deputy or assistant of a district attorney; or such other person or persons as may be authorized by law to act as representatives of the State of Maine in a criminal proceeding.

(c) Charge Tracking Number (CTN). "Charge Tracking Number" or "CTN" is a unique identifier that designates each charge associated with the formal action undertaken by a criminal justice agency initiating criminal charges that is designated by the ATN. The CTN is a three-character numeric field assigned to each charge and is added to the ATN with no hyphen or slash separating the two. The CTN is assigned by the Maine State Police upon the request of a criminal justice agency. A request must be made through the Maine Telecommunications and Radio Operations (METRO) system. A criminal charge that does not require an ATN under subdivision (1) of this rule does not require a CTN.

(d) District Court Judge. "District Court Judge" includes a justice or active retired justice of the Supreme Judicial Court or a justice or active retired justice of the Superior Court sitting in the District Court by assignment.

(e) State Identification Number. "State Identification Number" means the number assigned to a person by the State Bureau of Identification when the

person first becomes known to the Bureau. Events reported to the State Bureau of Identification that cause the assignment of a "State Identification Number" to a person by the Bureau include the custodial arrest and fingerprinting or the issuance or delivery of a Uniform Summons and Complaint as reported by a law enforcement agency, the filing of a complaint, the return of an indictment by a grand jury or the filing of an information relative to an individual as reported by a prosecutorial office (District Attorney office or office of the Attorney General), the final disposition of a case as reported by the courts, and the intake of an inmate by the Department of Corrections.

(f) Superior Court Justice. "Superior Court Justice" includes a justice or active retired justice of the Supreme Judicial Court or a judge or active retired judge of the District Court sitting in the Superior Court by assignment.

Advisory Committee Notes—2000

[M.R. Crim. P. 57(4).] This amendment clarifies the meaning of "attorney for the state" when used in the Maine Rules of Criminal Procedure. The phrase was defined prior to 1989. *See* Rule 54(c); *see also 3 Glassman, Maine Practice: Rules of Criminal Procedure Annotated* 434 (1967) and Me. Rptr. 551-562 A.2d CXVIII.

Advisory Committee Note—2003

[M.R. Crim. P. 57.] This amendment deletes the current definitions for "Universal Tracking Number" and "Incident Number," and adds new definitions for "Arrest Tracking Number" or "ATN," "Charge Tracking Number" or "CTN," and for "State Identification Number". Further, the amendment retains the former definition for "Attorney for the State" and arranges the four definitions in alphabetical order.

The Universal Tracking Number and Incident Number have been replaced by the Arrest Tracking Number/Charge Tracking Number or ATN/CTN, effective September 29, 2002. The ATN/CTN consists of two parts. The ATN is a seven-character field consisting of six numbers followed by one letter assigned in sequential order upon request from the Maine State Police; the CTN is a three-character field assigned to each charge in ascending sequential order beginning at 001 upon request from the Maine State Police. Together they will appear as 123456A001. There is no hyphen or slash separating the ATN from the CTN. The "Arrest Tracking Number" uses the word "arrest" as a term of art. It includes, as applicable to law enforcement agencies, the physical arrest and fingerprinting of an

individual or the issuance or delivery to the individual of a Uniform Summons and Complaint. As applicable to the prosecutorial office of a district attorney or Attorney General, it includes the filing of a complaint, the return of an indictment by a grand jury, or the filing of an information relative to an individual.

The State Identification Number has been redefined to incorporate events in addition to an arrest and fingerprinting that currently result in the assignment of a State Identification Number to a person by the State Bureau of Identification.

Advisory Note – June 2006

M.R. Crim. P. 57. The amendment adds parallel definitions for "District Court Judge" (see new subdivision (d)) and "Superior Court Justice" (see new subdivision (f)). The "District Court Judge" definition includes a justice or active retired justice of the Supreme Judicial Court or of the Superior Court when directed to sit in the District Court by the Chief Justice of the Supreme Judicial Court. By statute, when so directed, a justice or active retired justice of the Supreme Judicial Court or of the Superior Court "has authority and jurisdiction" in the District Court as if the justice were a regular District Court judge. 4 M.R.S. §§ 2-A, 121. It additionally includes the special situation addressed in 4 M.R.S. § 120. The "Superior Court Justice" definition includes a justice or active retired justice of the Supreme Judicial Court or a judge or active retired judge of the District Court when directed to sit in the Superior Court by the Chief Justice of the Supreme Judicial Court. By statute, when so directed, a justice or active retired justice of the Supreme Judicial Court or a judge or active retired judge of the District Court "has authority and jurisdiction" in the Superior Court as if the justice or judge were a regular Superior Court justice. 4 M.R.S. §§ 2-A, 157-C. Finally, the amendment redesignates paragraphs (1), (2), (3) and (4) to be subdivisions (a), (b), (c) and (e) respectively. The latter designations bring the Rule into conformity with the standard division employed throughout the Maine rules of Criminal Procedure.

RULES 58 TO 64. [RESERVED]

X. PROCEEDINGS FOR POST-CONVICTION REVIEW

RULE 65. NATURE OF THE PROCEEDING

An action for post-conviction review pursuant to 15 M.R.S. ch. 305-A shall be docketed by the clerk on the criminal docket of the Superior Court.

Advisory Committee Note—1981

[M.R. Crim. P. 65.] Post-conviction review has been excised entirely from Part IX of the Rules and allocated its own part in order to accommodate the multiple-rule treatment this unique proceeding warrants.

Advisory Committee Note—1981

[M.R. Crim. P. 65.] A post-conviction review proceeding is essentially *sui generis*, embodying heterogeneous features that defy pro forma application of the label "civil" and "criminal." Prior Maine law has grappled with this troublesome aspect variously:

Preceding the enactment of 15 M.R.S. ch. 305-A in 1979, the then controlling Rule 35(b)(5) of the Maine Rules of Criminal Procedure described the nature of the proceeding in relevant part as follows:

"A proceeding under this subdivision (b) is a civil proceeding. In respects not covered by statute [14 M.R.S. §§ 5502-5508], these rules, together with the Maine Rules of Civil Procedure where applicable [see also Rule 81, Maine Rules of Civil Procedure], shall govern the practice in these proceedings. . . ."

Following the enactment of 15 M.R.S. ch. 305-A (P.L.1979, ch. 701, § 15) the then controlling 15 M.R.S. section 2129, subsection 1 (repealed by P.L. 1981, ch. 238 § 5) described the nature of the proceeding in relevant part as follows:

"An action for post-conviction review is a criminal proceeding. The Maine Rules of Criminal Procedure and the Maine Rules of Civil Procedure, to the extent that they are not inconsistent with the provisions of this chapter, may be applied in the discretion of the court to proceedings commenced under this chapter. . . ."

The approach now chosen retains the proceeding on the criminal docket as reflected by Rule 65. However, contrary to prior Maine law, the present approach does not contemplate that the Maine Rules of Civil Procedure govern any aspect of the proceeding. In all respects not covered by 15 M.R.S. ch. 305-A, as amended by P.L. 1981, ch. 238, a post-conviction review proceeding is to be wholly controlled by the comprehensive new rules contained within Part XI and

all other relevant criminal rules (see Rule 1 of the Maine Rules of Criminal Procedure) except those made inapplicable by the new Part XI rules themselves.

Advisory Committee Note—1983

[M.R. Crim. P. 65.] The amendment corrects the title of Part XI.

RULE 66. PREREQUISITES TO AN ADJUDICATION ON THE MERITS

A petitioner must satisfy the following five statutory prerequisites to permit an adjudication on the merits by an assigned justice:

(a) Restraint or impediment under 15 M.R.S. § 2124;

(b) Prior exhaustion of remedies incidental to the proceedings in the trial court, or on appeal, or through administrative remedies as required by 15 M.R.S. § 2126;

(c) Absence of waiver of grounds for relief under 15 M.R.S. § 2128 except as exempted under 15 M.R.S. § 2128-A;

(d) Timely filing of the petition under 15 M.R.S. § 2128-B; and

(e) The stating of a ground upon which post-conviction relief can be granted under 15 M.R.S. § 2125.

Advisory Committee Note – 1981

[M.R. Crim. P. 66.] The purpose of Rule 66 is to alert the reader to the existence of sections 2124 and 2125, subject matter jurisdiction being dictated by the former and post-conviction relief being limited to the claims authorized by the latter.

Advisory Note – October 2013

Former Rule 66 has been deleted and replaced in order to make clear that to bring a petition permitting an adjudication on the merits by an assigned justice, the petitioner must satisfy the five statutory prerequisites of (a) restraint or impediment under 15 M.R.S. § 2124; (b) prior exhaustion of remedies incidental to the proceedings in the trial court or on appeal, or administrative remedies under 15

M.R.S. § 2126; (c) absence of waiver of one or more grounds for relief under 15 M.R.S. § 2128 except as exempted under 15 M.R.S. § 2128-A; (d) timely filing of the petition under 15 M.R.S. § 2128-B; and (e) the stating of one or more grounds upon which post-conviction relief can be granted under 15 M.R.S. § 2125. Title 15 M.R.S. § 2125, in addition to alluding to the other statutory prerequisites, contains its own prerequisite that the grounds for relief asserted in the petition relate to the criminal judgment being challenged as unlawful, the sentence being challenged as unlawful or unlawfully imposed, or the post-sentencing proceeding being challenged as illegal.

RULE 67. FORM AND CONTENTS OF THE PETITION

(a) Form Prescribed by Supreme Judicial Court. The petition shall be in the form prescribed by the Supreme Judicial Court.

(b) Challenges Allowed in Single Petition. The petition shall be limited to the assertion of a claim for review of one or more criminal judgments arising from a single trial or from a single proceeding for the entry of one or more pleas of guilty or nolo contendere, or of a single post-sentencing proceeding under 15 M.R.S. § 2124(2). If a petitioner desires to attack the validity of criminal judgments arising from two or more trials or plea proceedings or two or more post-sentencing proceedings, the petitioner shall do so by separate petitions. The court in its discretion may order separate consideration of criminal judgments challenged in the same petition or may order consideration together of criminal judgments or post-sentencing proceedings which are challenged in separate petitions.

(c) Designation of Respondent. The petition shall designate the State of Maine as the respondent.

(d) Identification of Criminal Judgment, Post-sentencing Proceeding, Court, and Date. The petition shall identify the criminal judgment which is challenged. If the petition challenges a post-sentencing proceeding, it shall identify both the post-sentencing proceeding and the original criminal judgment which generated the post-sentencing proceeding. It shall identify the court and the county or division in which the criminal judgment was entered, the name of the case and the docket number, the date of entry of judgment, and the sentence imposed.

(e) Prerequisites to an Adjudication on the Merits; Reasons for Relief and Facts in Support Thereof. The petition shall briefly address the five statutory prerequisites to an adjudication on the merits identified in Rule 66. It

shall briefly state each ground for relief and the essential facts in support of each ground. Argument, citation, and discussion of legal authorities shall be omitted from the petition but may be filed in a separate document.

(f) Specification of Relief Sought. The petition shall specify the relief requested. Failure to specify the precise relief requested or failure to specify the appropriate relief available shall not preclude the assigned justice from granting any relief to which the petitioner may be entitled.

Advisory Committee Note – 1981

[M.R. Crim. P. 67.] The present Rule 67 requirements were each previously found in 15 M.R.S. section 2129, subsection 2 (repealed by P.L.1981, ch. 238, § 5). Not all of the criteria present in the now-repealed statutory provision, however, have been incorporated in Rule 67. The last two sentences of subsection 2, paragraph B and all of subsection 2, paragraph F have been omitted as being inappropriate for treatment by rule. Subsection 2, paragraph I has been omitted because the obligation for supplying such documentation cannot, as a matter of both practicality and efficiency, be placed upon a petitioner. In this regard Rule 71 contemplates that the respondent will file with its response, *inter alia*, such documentation to assist the assigned justice. The first sentence of subsection 2, paragraph J has been omitted because summary dismissal for noncompliance as previously mandated by 15 M.R.S. § 2129, subsection 5, paragraph A (repealed by P.L. 1981, ch. 238, § 5) has not been carried over into Rule 70 for two reasons. First, the sanction is unduly harsh, necessitating the intervention of present Rule 40A. Second, non-compliance with the form petition requirements occur most frequently in cases in which the petitioner files without the assistance of counsel. Such defects are, as a matter of course, cured by amendment once counsel is involved. Rule 70 has been drafted with this fact in mind. It assures both the timely assistance of counsel and the opportunity for amendment before the respondent is called upon to file a response to the petition. Lastly, the second sentence of subsection 2, paragraph J has been omitted as unnecessary.

Advisory Note – October 2013

The amendment makes a number of changes to subdivision (e). Specifically it

(1) deletes and replaces in the subdivision's heading the words "Identification of Restraint or Impediment" with the words "Prerequisites to an Adjudication on the Merits";

(2) deletes from the second sentence the specific requirements that the petition briefly "identify the incarceration, other restraint or impediment under 15 M.R.S. § 2124" and replaces it with the broader requirement that the petition briefly "address the five statutory prerequisites to an adjudication on the merits identified in Rule 66," one of which is restraint or impediment. See also Advisory Note – October 2013 to M.R. Crim. P. 66; and

(3) replaces in the third sentence the word "reason" where appearing with the word "ground" for purposes of clarity. The former term does not appear in the post-conviction review statute.

RULE 68. FILING OF THE PETITION

The petition shall be filed as provided in 15 M.R.S. § 2129(1)(A).

Advisory Committee Note—1981

[M.R. Crim. P. 68.] The purpose of Rule 68 is to alert the reader to the fact that the requirements respecting the filing of a petition are found in 15 M.R.S. section 2129, subsection 1, paragraph A.

RULE 69. ASSIGNED COUNSEL

(a) Compliance with 15 M.R.S. ch. 305-A by Petitioner. A petitioner who desires to have counsel assigned either before or after final disposition of the petition shall comply with the procedure provided in 15 M.R.S. § 2129(1)(B).

(b) Determination of Indigency; Assignment and Compensation of Counsel. The determination of indigency and the assignment and compensation of counsel shall be governed by the provisions of Rules 44 and 44A.

(c) Continuing Duty of Counsel to Represent Petitioner. Counsel assigned by the assigned justice before final disposition of the petition shall continue to represent the petitioner on appeal unless relieved by order of the assigned justice or the Law Court.

Advisory Committee Note—1981

[M.R. Crim. P. 69.] Rule 69 is added to incorporate in one comprehensive rule the procedure respecting assigned counsel.

Subdivision (a)

Subdivision (a) alerts the reader to the procedural requirements of 15 M.R.S. section 2129, subsection 1, paragraph B applicable both before and after final disposition.

Subdivision (b)

Subdivision (b) incorporates the relevant portions of Rules 39E and 44 respecting determination of indigency and the appointment and compensation of counsel both before and after final disposition.

Subdivision (c)

Subdivision (c) incorporates with adaptation the substance of Rule 44(a)(2).

Advisory Note—July 2010

M.R. Crim. P. 69. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

RULE 69A. ASSIGNED JUDGE OR JUSTICE

(a) Assignment by Chief Justice of the Superior Court or by Designee. The Chief Justice of the Superior Court or the Chief Justice's designee shall assign petitions for post-conviction review.

(b) Assignment of Trial Judge or Justice. (1) When the petition addresses a conviction in the Superior Court, the trial justice who imposed sentence or ordered commitment under 15 M.R.S. § 103 may be assigned to the post-conviction review proceeding unless the trial justice is disqualified or is otherwise unavailable.

(2) When the petition addresses a conviction or juvenile proceeding in the District Court, the trial judge who imposed sentence or juvenile disposition may be assigned to act as a Superior Court Justice to hear the post-conviction review proceeding, unless the judge is disqualified or is otherwise unavailable.

(c) Assignment Other Than of the Trial Judge or Justice. If the trial justice or judge is not assigned under subdivision (b), the petition for post-conviction review may be assigned to the regular criminal docket, or assigned to any judge or justice.

(d) "Assigned Justice" Includes an Assigned Judge. As used in this Part, the term "assigned justice" includes an assigned judge.

Advisory Note – 2003

M.R. Crim. P. 69-A is adopted to address assignment of petitions for post-conviction review. Formerly, such assignments were a matter for administrative order. The rule includes three subdivisions.

Subdivision (a) provides that the Chief Justice of the Superior Court or that Justice's designee has the responsibility of assigning all petitions for post-conviction review.

Subdivision (b) abandons the current practice precluding the judge or justice who presided in the underlying criminal proceeding from being assigned the collateral proceeding. In its stead the rule now allows the trial judge or justice to be assigned the post-conviction case unless the trial judge or justice is disqualified or is otherwise unavailable.

Subdivision (c) addresses an assignment other than as provided in subdivision (b). It provides for two basic assignment options: assignment to the regular criminal docket, or assignment to any appropriate judge or justice.

Advisory Note – October 2013

The amendment to Rule 69A omits the hyphen in the rule number to maintain consistency with the other rules and adds a new subdivision (d) that clarifies that the term "assigned justice" as used in Part X includes a District Court judge assigned to a post-conviction review proceeding.

RULE 70. REVIEW OF THE PETITION BY ASSIGNED JUSTICE; SUMMARY DISMISSAL; RESPONSE; AMENDMENT TO THE PETITION; WITHDRAWAL OF PETITION; DISMISSAL OF PETITION WITH PREJUDICE FOR FAILURE TO PROSECUTE

(a) Review of Petition by Assigned Justice. The assigned justice shall promptly examine the petition.

(b) Summary Dismissal or Stay of the Petition. The assigned justice shall enter an order for the summary dismissal of the petition in whole or in part, stating the reasons for the dismissal, if from the face of the petition and any exhibits attached to it, the petition affirmatively discloses

(1) No restraint or impediment under 15 M.R.S. § 2124;

(2) Waiver of grounds for relief under 15 M.R.S. § 2128 and discloses no exception under 15 M.R.S. § 2128-A;

(3) Failure to adhere to the filing deadline under 15 M.R.S. § 2128-B; if section 1, paragraph C is triggered, further discloses a failure to exercise due diligence; or

(4) No ground upon which post-conviction relief can be granted under 15 M.R.S. § 2125.

The assigned justice shall cause the petitioner to be notified of the dismissal and the reasons for it.

In the event that the face of the petition and any exhibits attached to it affirmatively disclose one or more unexhausted remedies incidental to the proceedings in the trial court or on appeal, or administrative remedies under 15 M.R.S. § 2126, the assigned justice shall, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, either enter an order for the summary dismissal of the petition or enter an order staying the post-conviction review proceeding pending exhaustion, depending upon which alternative the assigned justice determines to be most appropriate under the circumstances. The assigned justice shall cause the person to be notified of the dismissal or stay and of the duty to exhaust.

(c) Response; Amendment to Petition. If the petition is not summarily dismissed pursuant to subdivision (b), the respondent shall file a response as follows:

(1) If the petitioner has been represented by counsel at the time of the filing of the petition or the petitioner does not desire to retain counsel, or, if indigent, to have counsel assigned, the assigned justice shall order the respondent to file a response pursuant to Rule 71 within 20 days of the date the order is received.

(2) If the petitioner has not been represented by counsel at the time of the filing of the petition but expresses an intent to retain counsel forthwith or has made application to have counsel assigned pursuant to Rule 69, the assigned justice shall provide the nonindigent petitioner the opportunity to retain counsel or shall assign counsel for the indigent petitioner. Within 45 days of the date counsel enters appearance or is assigned, counsel shall file either an amended petition or notice that no amended petition is to be filed. Additional time may be granted by the assigned justice for cause shown before or after the time has expired, with or without motion and notice. Following the filing of an amended petition or notice that no amended petition is to be filed, the clerk of the Superior Court shall mail a copy thereof to the respondent. Within 20 days of receipt of such copy, the respondent shall file a response pursuant to Rule 71.

(3) Following the filing of a response by respondent pursuant to paragraphs (1) and (2), a petition may be further amended only by leave of the assigned justice for good cause shown. If the assigned justice allows a petition to be amended after the filing of a response, the respondent may, except as the assigned justice might otherwise provide pursuant to Rule 72A(b)(3), file an additional response within 15 days of receipt of the amended petition.

(d) Withdrawal of Petition. A petitioner, at any time prior to final disposition, may move to withdraw a petition without such a withdrawal operating as an adjudication upon the merits by filing a signed request. The assigned justice shall grant such motion in the absence of a showing by the respondent that it would be unfairly prejudiced thereby. A motion to withdraw without prejudice may be signed by petitioner's counsel rather than by the petitioner personally if the motion includes a representation by counsel that the petitioner has instructed counsel to seek a withdrawal of the petition.

(e) Dismissal of Petition for Failure to Prosecute. The assigned justice, on his or her own initiative or on motion of the respondent, after notice to the parties, and in the absence of a showing of good cause to the contrary by the petitioner, shall dismiss a petition for want of prosecution at any time more than one year after the last docket entry showing any action taken therein by the petitioner other than a motion for a continuance. Unless the assigned justice in the order for dismissal otherwise specifies, such dismissal shall operate as an adjudication upon the merits.

Advisory Committee Note – 1981

[M.R. Crim. P. 70.] Rule 70 is added to incorporate in one comprehensive rule the procedure respecting the review of a petition by the assigned justice, summary dismissal, order to respond and amendment of the petition.

Subdivision (a)

Subdivision (a) incorporates the substance of the first sentence of the now repealed 15 M.R.S. section 2129, subsection 5 (repealed by P.L.1981, ch. 238, § 5).

Subdivision (b)

Subdivision (b) incorporates the substance of paragraph A of the now-repealed 15 M.R.S. section 2129, subsection 5 (repealed by P.L. 1981, ch. 238, § 5) except that portion applying summary dismissal to the form-petition requirements, see note *8,* supra.

Subdivision (c)

Subdivision (c) does not mirror the substance of the now-repealed 15 M.R.S. section 2129, subsection 5, paragraph B and subsection 6 (repealed by P.L. 1981, ch. 238, § 5). It is designed to accomplish the following: first, to reduce to a minimum the number of instances in which the respondent will be called upon to respond to a defective petition (see paragraphs (1) and (2)); second, to afford the respondent a realistic time period within which to respond to a petition (see paragraphs (1) and (2)); third, to insure that the respondent will not be called upon to file multiple responses because of inexcusable piecemeal amending of a petition (see paragraph 3); fourth, to afford each petitioner filing a petition without the benefit of counsel the opportunity to amend such petition with the assistance of counsel (see paragraphs (1) and (2)); and fifth, to impose upon petitioner's retained or appointed counsel no specific limitation as to the amount of time within which to renew and amend, if appropriate, a petition.

Advisory Committee Note – 1983

[M.R. Crim. P. 70.] The title of Rule 70 is amended to reflect the addition of new sections (d) and (e). At present Part XI is wholly silent as to whether, and under what circumstances, a petition can be withdrawn without the withdrawal operating as an adjudication upon the merits. The omission is undesirable. *Page v. State*, No. CR-81-70 (Me. Super. Pen. Cty., March 31, 1982). Proposed section (d), unlike M.R. Civ. P. 41(a), does not allow a dismissal "as of right" by the petitioner, because the respondent, in certain cases, could suffer discernable prejudice if forced to run the risk of future litigation of the same claims. Absent some actual prejudice to the respondent, however, section (d) contemplates that a petitioner's request to withdraw his petition will be granted and will not operate as an adjudication upon the merits.

At present Part XI is wholly silent as to whether, and under what circumstances, a petition may be dismissed by an assigned justice because of the petitioner's failure to prosecute. Proposed section (e) is modeled after M.R. Civ. P. 41(b). The two-year period of Rule 41(b), however, is reduced to one year, because inaction for one year is a sufficient ground for judicial intervention. Section (e) contemplates that except in unique circumstances—*e.g.*, where the failure to prosecute is attributable to petitioner's counsel—dismissal shall operate as an adjudication upon the merits, thereby, *inter alia*, triggering the application of 15 M.R.S. § 2138(3).

Advisory Committee Note – 1986

[M.R. Crim. P. 70(c)(2).] At present, Rule 70(c)(2) intentionally imposes "upon petitioner's retained or appointed counsel no specific limitation as to the amount of time within which to review and amend, if appropriate, a petition." M.R. Crim. P 70(c)(2) advisory committee's note to 1981 amend., Me. Rptr., 434-440 A.2d LXXIV. Such latitude has, however, proven unsatisfactory in practice since frequently petitioners' counsel fail to carry out their responsibility in a timely manner. Further, the situation has the potential of worsening once post-conviction review proceedings begin to be assigned to the regular criminal calendar. See P.L. 1985, ch. 209, § 1. The amendment is designed to reduce significantly the existing problem but, at the same time, provide for a realistic time limitation. In those cases in which the 45-day period is insufficient, one or more enlargements of time can be obtained by petitioners' counsel pursuant to Rule 45(b).

Advisory Committee Note – 1986

[M.R. Crim. P. 70.] In addition to the important substantive modification to Rule 70(c)(2) made by amendment effective February 15, 1986, Rule 70(c) has been substantively altered to eliminate its present requirement that the assigned justice "order" a response in favor of triggering the respondent's duty to respond through action by the clerk of the Superior Court.

Advisory Committee Note – 1990

[M.R. Crim. P. 70(d).] This amendment modifies the present rule to conform to present practice. The change does not allow petitioner's counsel to sign in the petitioner's stead if the motion requests a withdrawal with prejudice—i.e., a request which if granted would operate as an adjudication upon the merits.

Advisory Committee Note – 1993

[M.R. Crim. P. 70(c)(2).] Experience has shown that enlargements of time need not be as sparingly granted for petitions for post-conviction review as for criminal trials and appeals. Accordingly, the strict standard of enlargement of Rule 45(b) should be disentangled from post-conviction petitions. The amendment substitutes a more lenient standard of enlargement.

Advisory Note – July 2010

M.R. Crim. P. 70. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

Advisory Note – October 2013

Former subdivision (b) has been deleted and replaced in order to rectify two major deficiencies. First, former subdivision (b) employed the phrase "a ground upon which post-conviction relief can be granted" to inferentially allude to the three unmentioned statutory prerequisites of exhaustion of remedies under 15 M.R.S. § 2126, absence of waiver of one or more grounds for relief under 15 M.R.S. § 2128, and timely filing of the petition under 15 M.R.S. § 2128-B. New subdivision (b) expressly addresses each of the five statutory prerequisites. Further, in the exhaustion context, new subdivision (b) expressly recognizes the authority of an assigned justice, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, to

order a stay of the post-conviction review proceeding as an alternative to a summary dismissal if the assigned justice determines that to be most appropriate under the circumstances.

Second, former subdivision (b) failed to provide sufficient guidance to an assigned justice in determining when a summary dismissal was appropriate. New subdivision (b) replaces the phrase "if it plainly appears" modifying "the face of the petition and any exhibits annexed to it" with the modifying phrase "affirmatively disclose," the latter providing a clearer standard. *Libby v. State,* 2007 ME 80, ¶ 1 n.2, 926 A.2d 724. Further, what is now required to be affirmatively disclosed is specifically identified as to each of the five statutory prerequisites. The special circumstance included in subdivision (3) regarding the failure to adhere to the filing deadline in the event 15 M.R.S. § 2128-B(1)(C) is triggered reflects the additional precondition for granting a summary dismissal of "a failure to exercise due diligence." *Diep v. State,* 2000 ME 53, ¶ 6, 748 A.2d 974.

Subdivision (c)(2) is amended to provide further guidance to an assigned justice in granting for cause shown additional time within which petitioner's counsel can file either an amended petition or notice that an amended petition is to be filed. It expressly allows the granting of additional time "before or after the time has expired, with or without motion and notice." See also Advisory Note – October 2013 to M.R. Crim. P. 70(c)(2).

Subdivision (c)(3) is amended to make clear that the discretion given the respondent as to whether to file an additional response if a petition is further amended may nonetheless become mandatory if the assigned justice orders that an additional response be filed pursuant to Rule 72A(b)(3).

RULE 71. RESPONSE

(a) When Required. The respondent is required to respond to the original or amended petition only when directed to do so pursuant to Rule 70(c), or as may be further ordered to do so by the assigned justice pursuant to subdivision (c) of this rule or Rule 72A(b)(3).

(b) Enlargement of Time to File. Notwithstanding the filing deadlines imposed pursuant to Rule 70(c), subdivision (c) of this rule or Rule 72A(b)(3), additional time may be granted by the assigned justice for cause shown, before or after the time has expired, with or without motion and notice.

(c) Contents of Response. Except as otherwise provided herein, the response must answer each of the grounds asserted in the petition. In addition, it must state whether any ground in the petition fails to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified in Rule 66. As to any such allegedly barred ground, the respondent may, in lieu of addressing its substantive merits in the response, move for its dismissal as part of the response. The assigned justice, upon review of the filed response, may order the respondent to supplement the filed response by addressing the merits of any allegedly barred ground and set the time within which the supplemental response is to be filed. Other than in the context of moving to dismiss a ground, the response shall not include argument, citation, and discussion of legal authorities, but they may be filed in a separate document.

(d) Materials Attached to or Filed With Response. Respondent must attach to the response or file with the response whatever further documents or other materials the respondent is relying upon in support of any allegation of a barred ground. Respondent is encouraged to also include whatever further documents or other materials the respondent believes may assist the assigned justice in adjudicating any non-barred ground on the merits.

Advisory Committee Note—1981

[M.R. Crim. P. 71.] Rule 71 incorporates the substance of the now-repealed 15 M.R.S. section 2129, subsection 8 (repealed by P. L. 1981, ch. 238, § 5) with the single exception of its third sentence. Rule 71 places the same restriction on the respondent relative to the inclusion of argument, citation, and discussion of legal authorities as is imposed upon the petitioner pursuant to Rule 67(e).

Advisory Committee Note—1984

[M.R. Crim. P. 71.] The amendment makes clear that the respondent may annex helpful documents to its response, no matter whether the response is an answer or any of the forms of response identified in Rule 71.

Advisory Committee Note – 1986

[M.R. Crim. P. 71.] The Rule is amended for consistency with the contemporaneous amendment to Rule 70(c)(2).

Advisory Committee Note – 1986

[M.R. Crim. P. 71.] The first sentence of Rule 71 is altered to reflect the elimination of the assigned justice's order to respond in Rule 70(c)(2).

Advisory Committee Note – 1993

[M.R. Crim. P. 71.] See Note 8.

[8. M.R. Crim. P 70(c)(2). Experience has shown that enlargements of time need not be as sparingly granted for petitions for post-conviction review as for criminal trials and appeals. Accordingly, the strict standard of enlargement of Rule 45(b) should be disentangled from post-conviction petitions. The amendment substitutes a more lenient standard of enlargement.]

Advisory Note – October 2013

Former Rule 71 has been deleted and replaced because it failed to provide adequate guidance to the respondent. New Rule 71 structurally contains four subdivisions, each addressing a separate aspect of response procedure.

New subdivision (a) explains under what circumstances a respondent is required to file a response to the original or any amended petition. It makes clear that a response is required only when the respondent is directed to do so pursuant to Rule 70(c), is ordered by the assigned justice to file a supplemental response under subdivision (c) of this rule, or is ordered by the assigned justice to respond to a further amendment of the petition following the filing of an initial response pursuant to Rule 72A(b)(3).

New subdivision (b) sets the conditions and timing for the respondent to seek an enlargement of time within which to file a response, supplemental response, or additional response. It expressly allows the assigned justice, upon a showing of cause, to grant additional time "before or after the time has expired, with or without motion or notice." See also Advisory Note – October 2013 to M.R. Crim. P. 70(c)(2).

New subdivision (c) provides the content requirements for a response to the original or amended petition. The response must answer each of the grounds asserted except as to any ground that the respondent believes fails to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified

in Rule 66. As to any such ground believed by the respondent to be so barred, the response must expressly allege which of the five statutory prerequisites to an adjudication on the merits bars the ground. Thereafter, respondent has a choice as to how next to proceed. Respondent may either move to dismiss the allegedly barred ground in the response without also addressing its substantive merits or, alternatively, move to dismiss *and* address the substantive merits. The latter is the best course unless the response and any accompanying exhibits affirmatively disclose that the ground is barred since the assigned justice, upon a review of the filed response, may order the respondent to supplement the respondent's filed response by addressing the merits of the allegedly barred ground. Finally, the response must not include argument, citation, and discussion of legal authorities other than in the context of moving to dismiss a ground. However, such may be filed in a separate document accompanying the response.

New subdivision (d) describes what the respondent must or may attach to the response or file with it. In the context of an allegedly barred ground, the respondent must attach to the response or file with it whatever further documents or other materials the respondent is relying upon in support of the allegation. In the context of an answer to a ground, the respondent is encouraged to attach to the response or file with it the documents or other materials that the respondent believes may assist the assigned justice in adjudicating the ground on the merits.

RULE 71A. FILING A RESPONSE SEEKING DISMISSAL; TIMELY DISPOSITION BY ASSIGNED JUSTICE

If the response filed by the respondent seeks a dismissal of the petition in whole or in part based upon a petitioner's alleged failure to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified in Rule 66, the assigned justice

(a) In the case of an alleged failure on the part of the petitioner to demonstrate exhaustion of remedies incidental to the proceeding in the trial court or on appeal, or administrative remedies, shall dispose of the dismissal request based upon the pleadings, any further amendment of the pleadings, and any other material of record. In the event the assigned justice determines that one or more pending or available unexhausted remedies exist, the assigned justice shall, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, either grant the respondent's dismissal request or stay the post-conviction review proceeding pending exhaustion, depending upon

which alternative the assigned justice determines to be most appropriate under the circumstances.

(b) In the case of an alleged failure on the part of the petitioner to demonstrate one or more of the other statutory prerequisites, shall dispose of the dismissal request based upon the pleadings, any further amendment of the pleadings, and any other material of record unless the assigned justice determines that, as a matter of fairness to the petitioner, disposition should await an evidentiary hearing.

Advisory Note – October 2013

New Rule 71A addresses the timely disposition by an assigned justice of a response filed by a respondent seeking a dismissal of the petition in whole or in part based upon a petitioner's alleged failure to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified in Rule 66. *See also* Advisory Note – October 2013 to M.R. Crim. P. 66.

Paragraph (a) of Rule 71A addresses a respondent's dismissal request based on an alleged failure on the part of the petitioner to demonstrate a prior exhaustion of remedies incidental to the proceeding in the trial court or on appeal, or administrative remedies under 15 M.R.S. § 2126. The assigned justice is directed to dispose of the dismissal request based on the pleadings, any further amendment of the pleadings, and any other material of record. Further, in the event the assigned justice determines that one or more pending or available unexhausted remedies exist, it expressly recognizes the authority of an assigned justice, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, to order a stay of the post-conviction review proceeding as an alternative to granting the respondent's dismissal request if the assigned justice determines that to be most appropriate under the circumstances.

Paragraph (b) of Rule 71A addresses a respondent's dismissal request based on an alleged failure on the part of the petitioner to demonstrate one or more of the other statutory prerequisites of restraint or impediment under 15 M.R.S. § 2124, absence of waiver of grounds for relief under 15 M.R.S. § 2128 and not exempted under 15 M.R.S. § 2128-A, timely filing of the petition under 15 M.R.S. § 2128-B, and a ground upon which post-conviction relief can be granted under 15 M.R.S. § 2125. It requires the assigned justice to dispose of the dismissal request based on the pleadings, any further amendment to the pleadings, and any other material of

record, unless "the assigned justice determines that, as a matter of fairness to the petitioner, disposition should await an evidentiary hearing."

RULE 72. DISCOVERY

(a) In General. A party shall not be entitled to discovery in a proceeding for post-conviction review unless, and to the extent that, the assigned justice, upon motion and for good cause shown, grants leave for discovery. If leave for discovery is granted, the assigned justice shall specify the appropriate means of discovery, provided that depositions shall be ordered only pursuant to Rule 15.

(b) Discovery From Former Defense Counsel. If ineffective assistance of counsel is a ground of the petition and the respondent needs discovery from that defense counsel, the respondent may move for discovery, including an order requiring defense counsel to answer questions intended to allow the respondent to evaluate and respond to the petitioner's assertions of ineffective assistance. The motion shall state the nature of the disclosure sought and why it is needed. The motion shall be granted by the assigned justice for good cause shown. If leave for discovery is granted, the assigned justice shall specify the means, scope, and timing of discovery to be employed.

Advisory Committee Note – 1981

[M.R. Crim. P. 72.] Rule 72 incorporates the substance of the now-repealed 15 M.R.S. section 2129, subsection 9 (repealed by P.L. 1981, ch. 238, § 5).

Advisory Committee Note – 1983

[M.R. Crim. P. 72.] The amendment seeks to offer guidance on the appropriate means of discovery in post-conviction proceedings.

Advisory Note – October 2013

Rule 72 has been structurally modified to accommodate two subdivisions. Subdivision (a), with the heading "In General," contains the substance of Rule 72 before the structural change. Subdivision (b), with the heading "Discovery From Former Defense Counsel," balances the interests of the petitioner and the respondent if ineffective assistance of counsel is a ground of the petition. The respondent may need timely discovery from former defense counsel in order to establish the needed facts relative to that counsel's representation. The petitioner

is entitled, according to ABA Formal Opinion 10-456 (July 14, 2010), to "court-supervised" disclosure from former defense counsel. Subdivision (b) regulates the means, scope, and timing of that disclosure.

RULE 72A. CONFERENCE FOLLOWING THE FILING OF THE PLEADINGS

(a) Scheduling. Following the filing of the pleadings, the clerk of the Superior Court shall as soon as possible schedule a conference and give notice to the parties thereof. The assigned justice may dispense with a conference.

(b) Matters to Be Considered at Conference. The assigned justice and the parties shall consider the following matters at the conference and the assigned justice shall enter an order which shall state the action taken by the assigned justice or agreed upon by the parties with respect to each of the said matters:

(1) The assigned justice's action in disposing of all motions pending at the time of the conference.

(2) The assigned justice's action with respect to the filing by the parties of further motions and the date by which such filings shall be accomplished.

(3) Any instruction of the assigned justice to the parties with respect to further amendment of the pleadings in the case and the date by which such further amendment of the pleadings shall be completed.

(4) The record upon which the final disposition of the petition is to be made by the assigned justice.

(5) The assigned justice's determination as to whether an evidentiary hearing is required.

(6) The time and place of the evidentiary hearing.

(7) A list of all witnesses to be called by the parties at the evidentiary hearing. The assigned justice shall specify a date by which notice shall be given to the assigned justice and the opposing party of any additions to this list of witnesses by any party.

(8) If there is to be no dispositional hearing, unless dispensed with by the parties and the assigned justice, the briefing schedule, including oral argument.

(9) The assigned justice may direct that the expected testimony of some or all of the expected witnesses be presented to the justice by affidavit sworn by the expected witness, and schedule a further conference to determine, after receipt and review of the affidavits, if the expected evidence justifies proceeding to a live testimonial hearing or if the matter may be resolved based on affidavits and briefing.

Advisory Committee Note—1986

[M.R. Crim. P. 72A.] As a general rule, following the filing of the pleadings the case is not in a proper posture for final disposition. A conference among the parties and the assigned justice to address the recurring problems specified in the rule, at least some of which appear in almost every case, is a practical necessity. The conference may, in appropriate cases, take place by means of a telephone conference.

In those few cases in which a conference is wholly unnecessary, the assigned justice with the concurrence of both parties can dispense with it entirely.

Advisory Committee Note—1990

[M.R. Crim. P. 72A(b).] Rule 72A(b)(9) is added to enable an assigned justice to make an informed decision on whether a live testimonial hearing is necessary.

RULE 73. EVIDENTIARY HEARING, BRIEFS AND ARGUMENTS

(a) Evidentiary Hearing. At the time of the conference, or if a conference is dispensed with, within 30 days of the date the response is filed, either the petitioner or the respondent may request an evidentiary hearing. If either party makes such a request, the assigned justice shall, after a review of the pleadings and any other material of record, determine whether an evidentiary hearing is required. If the justice determines that an evidentiary hearing is required, the hearing may be ordered held in any place open to the public in any county.

(b) Time for Briefs When No Hearing. Unless a briefing schedule has earlier been incorporated in an order arising out of the conference, if no request for

an evidentiary hearing has been made or if the assigned justice determines no evidentiary hearing is required, the clerk shall send a briefing schedule to the parties as follows: The petitioner's brief shall be filed within 30 days after the last day on which a hearing could have been requested; the respondent shall file its brief within 30 days after receipt of the petitioner's brief; and the petitioner may file a reply brief within 14 days after receipt of the respondent's brief.

(c) Time for Briefs When Hearing Held. Unless otherwise ordered by the assigned justice, if an evidentiary hearing is held the petitioner's brief shall be filed within 30 days of the close of the hearing; the respondent shall file its brief within 30 days of receipt of the petitioner's brief; and the petitioner may file a reply brief within 14 days after receipt of the respondent's brief.

(d) Oral Argument. Unless dispensed with by the assigned justice, if no evidentiary hearing is held the clerk shall schedule oral argument on the next available date after the last brief is received. Oral argument may be waived by the parties.

Advisory Committee Note—1981

[M.R. Crim. P. 73.] Rule 73 incorporates the substance of the now-repealed 15 M.R.S. section 2129, subsection 10 (repealed by P.L.1981, ch. 238, § 5).

Advisory Committee Note—1986

[M.R. Crim. P. 73.] Rule 73 is modified in two regards. First, it places the onus on the parties to request a dispositional hearing. Second, it provides for a briefing schedule, including oral argument, in the absence of a prior order by the assigned justice.

RULE 73A. MOTION FOR JUDGMENT

After the petitioner has completed the presentation of evidence at the hearing on the petition, the respondent, without waiving its right to offer evidence in the event the motion is not granted, may move for judgment on the ground that upon the facts and the law the petitioner has shown no right to relief.

Advisory Committee Note—1983

[M.R. Crim. P. 73A.] The amendment seeks to clarify the procedure employed at a post-conviction evidentiary hearing.

RULE 74. BAIL PENDING FINAL DISPOSITION OF THE PETITION

(a) Application to Assigned Justice. A petitioner may apply to the assigned justice for bail pending final disposition.

(b) Standards Governing Bail. An assigned justice may order the release of the petitioner on bail if:

(1) The assigned justice is satisfied, on the basis of the pleadings, or the pleadings supplemented by any evidence received at a hearing on the petition pursuant to Rule 73, that the petitioner has a reasonable likelihood of prevailing on the petition;

(2) release on bail is appropriate given the crime and the nature of the ultimate relief contemplated by the assigned justice if the petitioner were to prevail; and

(3) the standards and conditions governing bail contained in 15 M.R.S. § 1051 (2) and (3) are satisfied.

(c) Revocation of Bail Pending Final Disposition of Petition. An assigned justice may revoke an order of bail granted pending final disposition of the petition upon determination made after notice and opportunity for hearing that:

(1) the petitioner has violated a condition of bail; or

(2) the petitioner has been charged with a crime allegedly committed while the petitioner was on release pending final disposition of the petition.

Advisory Committee Note—1981

[M.R. Crim. P. 74.] 15 M.R.S. section 2129, subsection 4 presently provides that "[p]ending final disposition, the assigned justice may order the release of the petitioner on bail at such time and under such circumstances and conditions as the Supreme Judicial Court shall by rule provide."

Rule 74 is added to prescribe the time, circumstances and conditions pursuant to which the assigned justice may order the release of a petitioner on bail pending final disposition.

Rule 74, like 15 M.R.S. section 2129, subsection 4, starts from the perspective that petitions are in an "after conviction" posture rather than in the "pre-conviction" posture to which Article 1, Section 10 of the Maine Constitution has application. *See Fredette v. State*, Me., 428 A.2d 395 (1981). In addition, both start from the perspective that no statute of this State affords petitioners the right to have bail set pending final disposition. Finally, both do not ignore the "bailable"/"nonbailable" dichotomy respecting Maine crimes created by Article 1, Section 10 nor its legislative application. *See again Fredette v. State, supra.*

Subdivision (a)

Subdivision (a) allows all petitioners—irrespective of the nature of the underlying criminal judgment—to make application for bail pending final disposition.

Subdivision (b)

Subdivision (b) sets out three standards which circumscribe the exercise of the assigned justice's discretionary authority to set bail prior to final disposition of the petition.

Subdivision (b), paragraph (1)

Subdivision (b), paragraph (1) is similar in substance to that found in the now-repealed 15 M.R.S. section 2129, subsection 11 (repealed by P.L.1981, ch. 238, § 5) except that, unlike subsection 11, it makes unmistakably clear that the assigned justice's assessment, made prior to the evidentiary hearing, if any, as to whether the "petitioner has a reasonable likelihood of prevailing on the petition" must be made solely from an examination of both the petition and the response, including any accompanying documentation annexed or filed therewith. Or stated slightly differently, paragraph (1), unlike its statutory precursor, plainly bars the petitioner, prior to the evidentiary hearing, if any, from attempting to demonstrate "a reasonable likelihood of prevailing on the petition" by means of an evidentiary hearing.

Finally, although not expressly articulated in paragraph (1), it is not designed to preclude an assigned justice from setting bail prior to the filing of a response by the respondent, to prevent unconscionable results—e.g., to afford bail to a

petitioner who is about to commence the execution of, or who has commenced the execution of, a sentence so short in length that such sentence will be fully served before the filing of a response by the respondent can be had.

Subdivision (b), paragraph (2)

Subdivision (b), paragraph (2) provides, as does present 15 M.R.S. section 2130 relative to bail pending appeal, that bail be set only if realistic in view of the appropriate relief. *Lewisohn v. State*, Me., 431 A.2d 53 (1981). Additionally, even if bail were realistic in view of the relief contemplated, paragraph (2) would nonetheless preclude bail if by law the offenses were determined to be "nonbailable" under the circumstances.

Subdivision (b), paragraph (3)

Subdivision (b), paragraph (3) simply makes applicable the post-conviction standards and conditions governing bail pending appeal contained in Rule 46A(c)-(d).

Advisory Committee Note—1983

[M.R. Crim. P. 74(b)(3).] The amendment corrects a now-erroneous cross reference.

Advisory Committee Note—1987

[M.R. Crim. P. 74(b)(3).] See Advisory Committee Note to amendment to Rule 46A.

[M.R. Crim. P. 46A. As the Legislature has enacted a comprehensive statute governing post-conviction bail (15 M.R.S. § 1701-B) which differs substantially from the procedure and standards of Rules 46A, 46B, and 46C, Rule 46A is amended to provide a reference to the statute and Rules 46B and 46C are deleted. Rule 46A also explains where a petition for review of post-conviction bail should be filed and provides for prompt delivery by the clerk of a copy of the petition to an appropriate Justice of the Supreme Judicial Court.]

RULE 75. BAIL PENDING APPEAL WHEN RELIEF IS GRANTED TO THE PETITIONER

(a) Application to Assigned Justice. A petitioner who has been granted relief may apply to the assigned justice for bail pending appeal.

(b) Standards Governing Bail Pending Appeal. The assigned justice may order the release of the petitioner on bail pending appeal when relief has been granted to the petitioner if the requirements of Rule 74(b)(2)-(3) are satisfied.

(c) Revocation of Bail Granted Pending Appeal. The assigned justice may revoke an order of bail granted pending appeal pursuant to Rule 74(c).

Advisory Committee Note—1981

[M.R. Crim. P. 75.] 15 M.R.S. section 2130, last sentence presently provides that "[w]hen relief is granted to the petitioner and release is appropriate, the justice may release a petitioner on bail pending appeal."

As a consequence, an assigned justice can only entertain an application for bail after final judgment if the petitioner has prevailed.

Rule 75 is added to prescribe the time, circumstances and conditions pursuant to which the assigned justice may set bail pending appeal for a successful petitioner.

Rule 75 starts from the perspective that, despite the fact that the petitioner has prevailed on his petition, he is yet in an "after-conviction" posture rather than in the "preconviction" posture for which Article I, Section 10 of the Maine Constitution has application. *See Fredette v. State*, Me., 428 A.2d 395 (1981). In addition it starts from the posture that neither present 15 M.R.S. section 2130 nor any other statute of this State affords petitioner the right to have bail set pending appeal. Finally, it does not ignore either the "bailable"/"nonbailable" dichotomy respecting Maine crimes created by Article 1, Section 10 nor its legislative application. *See again Fredette v. State*, supra.

Subdivision (a)
Subdivision (a) adopts and incorporates Rule 74(a).

Subdivision (b)
Subdivision (b) incorporates Rule 74(b) to the extent relevant.

Subdivision (c)
Subdivision (c) incorporates Rule 74(c).

RULE 75A. STAY OF EXECUTION

(a) Bail Pending Final Disposition. If the assigned justice orders the release of the petitioner on bail pending final disposition of the petition pursuant to Rule 74(b) and the petitioner is admitted to bail, the sentence is automatically stayed. If the final judgment is adverse to the petitioner, the stay automatically terminates when the judgment making final disposition is entered in the criminal docket. When a stay of sentence of imprisonment is so terminated, the clerk of the Superior Court shall forthwith mail a date-stamped copy of the judgment making final disposition to the parties and to the sheriff named in the underlying commitment order. Within 3 days after that mailing, excluding Saturdays, Sundays and legal holidays, the petitioner's counsel or, if not represented by counsel, the petitioner shall contact the office of the sheriff named in the underlying commitment order and make arrangements satisfactory to the sheriff for surrendering into that sheriff's custody that day or, at the direction of the sheriff, the next regular business day. If such arrangements are not timely made, or if the arrangements are not complied with, upon the request of the named sheriff or the attorney for the respondent, or by direction of the assigned justice, the clerk of the Superior Court shall issue a warrant for the petitioner's arrest. Upon issuance of that warrant and necessary notice by the clerk to the assigned justice of that fact, the assigned justice, in conformity with Rule 46(f)(1), shall declare a forfeiture of the Rule 74 bail because of the breach of condition.

(b) Bail Pending Appeal. If the assigned justice orders the release of the petitioner on bail pending appeal pursuant to Rule 75(b) and the petitioner is admitted to bail, execution of the sentence shall be stayed as provided in Rule 38(a) and (b). The procedure for the petitioner's surrender following automatic termination of a stay of sentence of imprisonment is as provided in subdivision (a).

Advisory Committee Note—1983

[M.R. Crim. P. 75A.] Rule 75A makes clear that a stay of execution of a sentence following release on bail pending appeal is controlled by Rule 38. At present Part XI is wholly silent on the matter.

Advisory Committee Note—1995

[M.R. Crim. P. 75A.] The amendment makes two changes of substance. First, it incorporates bail pending final disposition of the petition under Rule 74(b). Previously, only bail pending appeal under Rule 75(b) was addressed. Secondly, it

adopts the relevant substance of new Rule 38(c) to a proceeding for post-conviction review.

Advisory Committee Note—2003

[M.R. Crim. P. 75A(a).] The amendment corrects an incorrect reference to Rule 46.

RULES 76 AND 77. [ABROGATED]

Advisory Committee Notes—2002

[M.R. Crim. P. 76 and 77.] The rules listed in the above section of the rules amendments, Rules 37C, 37D, 37E, 37F, 37G, 37H, 40, 40A, 76, 77, 88 and 89 of the Maine Rules of Criminal Procedure are abrogated, effective January 1, 2002. These rules are the remaining rules covering discretionary appeals that are now replaced by M.R. App. 19 and 20. Other provisions of the Discretionary Appeal Rules have already been abrogated, effective December 31, 2001 by the rule making orders adopted December 14, 2000 and effective January 1, 2001.

RULE 78. [ABROGATED]

Advisory Notes—2001

[M.R. Crim. P. 78.] Section 1 [of Supreme Judicial Court order] addresses the current rules in the Maine Rules of Civil Procedure, the Maine Rules of Criminal Procedure and the Maine Rules of Probate Procedure governing appeals to the Law Court. It adds a provision to each of those rules noting that they are limited to appeals filed on or before December 31, 2001. It also provides a reference to the Maine Rules of Appellate Procedure for appeals filed on or after January 1, 2001. The quoted language may appear directly in the rule of by reference such as: "See limitation on applicability preceding the text of Rule 72."

Separately, section 1(d) abolishes or abrogates each of the listed rules, effective December 31, 2001. By that time, any appeals filed before December 31, 2000, should be sufficiently processed that there is no further need for the appeal rules within the individual rules.

RULES 79 TO 84. [RESERVED]

XI. EXTRADITION PROCEEDINGS

RULE 85. NATURE OF THE PROCEEDINGS

A petition contesting extradition pursuant to 15 M.R.S. § 210 shall be docketed by the clerk on the criminal docket of the District Court or in the unified docket of a court with a unified criminal docket.

Advisory Committee Note—1983

[M.R. Crim. P. 85.] This rule makes clear that a petition contesting extradition is a criminal matter and should be docketed accordingly.

Advisory Committee Note—1998

[M.R. Crim. P. 85.] *See* Advisory Committee Note to M.R. Crim. P. 88. [M.R. Crim. P. 88. References to the "Superior Court" and "justice" are replaced with "District Court" and "judge" to reflect the recent statutory changes to 15 M.R.S. § 210 and 210-A requiring that the petition contesting extradition be filed in the District Court rather than in the Superior Court. *See* P.L. 1997, ch. 181; L.D. 693 Summary (118th Legis. 1997).]

Advisory Note—July 2010

This amendment clarifies that petitions contesting extradition can be filed in courts with unified criminal dockets. *See* Administrative Order JB-08-2, *Establishment of the Cumberland County Unified Criminal Docket,* effective January 1, 2009, and Administrative Order JB-10-1, *Establishment of the Bangor Unified Criminal Docket,* effective January 4, 2010.

RULE 86. ASSIGNMENT OF COUNSEL

The determination of indigency, the assignment and compensation of counsel, and the continuing duty of counsel to represent petitioner shall be governed by the provisions of Rules 44, 44A and 44B.

Advisory Committee Note—1983

[M.R. Crim. P. 86.] The same provisions which govern appointment of counsel in the trial and appeal of criminal matters govern assignment of counsel for

petitioners in extradition proceedings. The applicable statute, 14 M.R.S. § 210, states that a person arrested on a Governor's warrant shall be informed "that he has the right to demand and procure legal counsel." Although this language does not explicitly require the appointment of counsel for indigent petitioners, it has been the customary practice in Maine to appoint counsel. See Uniform Laws Annotated, Uniform Criminal Extradition Act, § 10, n.15. Given this practice, application of existing procedural rules on the subject is appropriate.

Advisory Note—July 2010

M.R. Crim. P. 86. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

RULE 87. DISCOVERY

Upon written request petitioner is entitled to receive copies of the Governor's warrant, the demand for extradition and all documents in support thereof. A party is not otherwise entitled to discovery except upon motion and a showing of good cause why such discovery should be allowed.

Advisory Committee Note—1983

[M.R. Crim. P. 87.] Documents provided by the requesting state in support of an extradition request are currently provided to petitioners upon request and this practice is appropriate. Other discoverable material may be obtained only upon motion and a showing of good cause.

RULES 88 AND 89. [ABROGATED]

Advisory Committee Notes—2002

[M.R. Crim. P. 88 and 89.] The rules listed in the above section of the rules amendments, Rules 37C, 37D, 37E, 37F, 37G, 37H, 40, 40A, 76, 77, 88 and 89 of the Maine Rules of Criminal Procedure are abrogated, effective January 1, 2002. These rules are the remaining rules covering discretionary appeals that are now replaced by M.R. App. 19 and 20. Other provisions of the Discretionary Appeal Rules have already been abrogated, effective December 31, 2001 by the rule making orders adopted December 14, 2000 and effective January 1, 2001.

RULE 90. [ABROGATED]

Advisory Notes—2001

[M.R. Crim. P. 90.] Section 1 [of Supreme Judicial Court order] addresses the current rules in the Maine Rules of Civil Procedure, the Maine Rules of Criminal Procedure and the Maine Rules of Probate Procedure governing appeals to the Law Court. It adds a provision to each of those rules noting that they are limited to appeals filed on or before December 31, 2000. It also provides a reference to the Maine Rules of Appellate Procedure for appeals filed on or after January 1, 2001. The quoted language may appear directly in the rule or by reference such as: "See limitation on applicability preceding the text of Rule 72."

Separately, section 1(d) abolishes or abrogates each of the listed rules, effective December 31, 2001. By that time, any appeals filed before December 31, 2000, should be sufficiently processed that there is no further need for the appeal rules within the individual rules.

XII. POSTCONVICTION MOTION FOR DNA ANALYSIS; NEW TRIAL HEARING

RULE 95. INITIATION OF PROCEEDINGS

(a) Person Entitled to Bring a Motion; Filing and Service. Any person who satisfies the prerequisites of 15 M.R.S. § 2137 may file a motion for DNA analysis as provided under 15 M.R.S. § 2138(1). Filing and serving must be in accordance with Rule 49.

(b) Docketing and Assignment. A post-conviction motion for DNA analysis pursuant to 15 M.R.S. ch. 305-B shall be docketed by the clerk in the underlying criminal proceeding. The motion shall be assigned as provided pursuant to 15 M.R.S. § 2138(1).

Advisory Note – March 2010

M.R. Crim. P. 95(b). The amendment corrects typographical and syntactical errors and recognizes current usage of M.R.S. as the Court's primary reference.

RULE 96. ASSIGNMENT OF COUNSEL

(a) Compliance with 15 M.R.S. § 2138(3). Following the filing of a motion for DNA analysis, the court may assign counsel any time during the proceeding.

(b) Determination of Indigency; Assignment and Compensation; Continuing Duty to Represent. The determination of indigency, the assignment of and compensation of counsel, and the continuing duty of counsel to represent the person shall be governed by the provisions of Rules 44, 44A and 44B.

Advisory Note – March 2010

M.R. Crim. P. 96(a). The amendment, in addition to one formalistic change, makes two changes to reflect more correctly the substance of 15 M.R.S. § 2138(3). First, it adds the statutory precondition to the appointment of counsel that the court first make a specific finding of indigency relative to the person filing the motion. Second, it replaces the word "proceeding" with "proceedings" since 15 M.R.S. ch. 305-B provides for more than one proceeding.

Advisory Note—July 2010

M.R. Crim. P. 96. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

RULE 97. INITIAL TRIAL COURT PROCEEDINGS

(a) Order Preserving Evidence. Following the filing of a motion for DNA analysis the court shall order the State to preserve evidence and prepare and submit an evidence inventory as provided under 15 M.R.S. § 2138(2).

(b) Court Findings; Order Directing Crime Lab to Perform DNA Analysis. Pursuant to 15 M.R.S. § 2138(5), the court shall state its findings of fact on the record or shall make written findings of fact supporting its decision to grant or deny a motion to order DNA analysis. If the court determines that the person has satisfied the burden of proof required under 15 M.R.S. § 2138(4), the court shall order the crime lab to perform DNA analysis on the identified evidence and on a DNA sample obtained from the person.

(c) Payment of Cost of DNA Analysis. In the case of an indigent person, the cost of the DNA analysis shall be paid by the crime lab. A nonindigent person

or a person found by the court to have the financial means with which to bear a portion of the cost of the DNA analysis shall make satisfactory financial arrangements with the crime lab within 14 days of the filing of the court order directing the crime lab to perform DNA analysis. Determination of indigency shall be governed by Rule 44A.

RULE 98. DNA ANALYSIS RESULTS

(a) Compliance With 15 M.R.S. § 2138(8). The DNA analysis results shall be provided by the crime lab to the court, the person and the attorney for the State. Upon motion by the person or the attorney for the State, the court may order that copies of the analysis protocols, laboratory procedures, laboratory notes and other relevant records compiled by the crime lab be provided to the court, the person and the attorney for the State.

(b) Analysis Results Other Than That the Person Is Not the Source of the Evidence. If the results of the DNA analysis are inconclusive or show that the person is the source of the evidence, the court shall deny any motion for a new trial as provided under 15 M.R.S. § 2138(8)(A).

(c) Analysis Results Showing the Person Is Not the Source of the Evidence. If the results of the DNA analysis show that the person is not the source of the evidence, the court shall assign counsel if the court finds that the person is indigent under Rule 96(b) and shall hold a hearing as provided under 15 M.R.S. § 2138(10).

(d) Request for Reanalysis by the Attorney for the State. If the analysis results show the person is not the source of the evidence, upon motion of the attorney for the state, the court shall order reanalysis of the evidence and shall stay the hearing pending the results of DNA analysis.

Advisory Note – June 2006

M.R. Crim. P. 98(c). The amendment changes the statutory reference to conform to P.L. 2005, ch. 659, §§ 4, 5. The amendment is effective September 1, 2006 to coincide with the effective date of the Public Law. *See* P.L. 2005, ch. 659, § 6.

Advisory Note—July 2010

M.R. Crim. P. 98(c). *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

RULE 99. HEARING; COURT FINDINGS; NEW TRIAL GRANTED OR DENIED

At the conclusion of the hearing held as provided under 15 M.R.S. § 2138(10), the court shall state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the person a new trial as required under 15 M.R.S. § 2138(10).

Advisory Note – June 2006

M.R. Crim. P. 99. The amendment changes the statutory reference to reflect new legislation. *See* Advisory Note to M.R. Crim. P. 98(c).

XIII. POST-JUDGMENT MOTION AND HEARING FOR DETERMINATION OF FACTUAL INNOCENCE AND CORRECTION OF RECORD BASED ON A PERSON'S IDENTITY HAVING BEEN STOLEN AND FALSELY USED IN A CRIMINAL PROCEEDING; SUBSEQUENT DISCOVERY OF FRAUD OR MISREPRESENTATION

RULE 105. INITIATION OF PROCEEDINGS

(a) Person or Entity Entitled to File a Post-Judgment Motion. Any person who satisfies the prerequisites of 15 M.R.S. §§ 2181 and 2182 may file a post-judgment motion in the underlying criminal proceeding for determination of factual innocence and correction of the court records and related criminal justice agency records. The attorney for the state or a court may file the motion on behalf of a qualifying person. Filing must be in accordance with Rule 49(d) and (e).

(b) Docketing and Assignment of Post-Judgment Motion. The post-judgment motion shall be docketed by the clerk in the underlying criminal proceeding as contemplated by 15 M.R.S. §§ 2182(1) and 2183(1). The motion shall be assigned as provided under 15 M.R.S. § 2183(1).

(c) Service of the Post-Judgment Motion. Pursuant to 15 M.R.S. § 2183(1), the specially assigned judge or justice shall determine upon whom and

how service of the post-judgment motion is to be made and enter an order in this regard.

RULE 106. ASSIGNMENT OF COUNSEL

(a) Compliance with 15 M.R.S. § 2183(2). Following the filing of a post-judgment motion, if the court finds the person to be indigent, the court may assign counsel at any time during the proceedings.

(b) Determination of Indigency, Assignment and Compensation; Continuing Duty to Represent. The determination of indigency, the assignment of and compensation of counsel, and the continuing duty of counsel to represent the person shall be governed by the provisions of Rules 44, 44A and 44B.

Advisory Note—July 2010

The reasons for amendment to Rule 106 are generally addressed in the Advisory Note—July 2010 to M.R. Crim. P. 44. The statute implementing the Maine Commission on Indigent Legal Services explicitly references case types that fall under the Commission's purview, including criminal matters. *See* P.L. 2009, ch. 419 and 4 M.R.S. §§ 1801, 1802(4) and 1804. This amendment clarifies that Rule 44 applies to all cases wherein the court is required or permitted to appoint or assign counsel to represent a party at state expense in proceedings governed by the Criminal Rules.

The amendment changes the reference from appointing counsel to assigning counsel and refers the reader to Rules 44, 44A, and 44B for the specifics about the determination of indigency, the assignment of and compensation of counsel, and the continuing duty of counsel to represent the person.

RULE 107. REPRESENTATION OF THE STATE

Representation of the state in these proceedings shall be as provided in 15 M.R.S. § 2183(3).

RULE 108. HEARING; CERTIFICATION OF RESULTS; CORRECTION OF THE RECORD

At the conclusion of the hearing held pursuant to 15 M.R.S. § 2183(5), the court shall issue a written order certifying its determination. The order must

contain written findings of fact supporting the court's decision granting or denying the motion and a copy thereof shall be provided to the person, all as required pursuant to 15 M.R.S. § 2183(5). If the court grants the motion, the court shall issue an additional order specifying the corrections to be made in the court records and the records of each of the appropriate criminal justice agencies, as provided in 15 M.R.S. § 2183(6).

RULE 109. SUBSEQUENT DISCOVERY OF FRAUD OR MISREPRESENTATION

If, subsequent to the granting of the motion, the court holds a hearing to determine fraud or misrepresentation under 15 M.R.S. § 2183(7), the court may, if it finds the existence of material misrepresentation or fraud, issue an order vacating its earlier order certifying a determination of factual innocence and modify accordingly any earlier ordered record correction, as provided under 15 M.R.S. § 2183(7).

Advisory Note – March 2010

M.R. Crim. P. Part XIII and Rules 105-109. Rules 105 – 109 address the new statutory post-judgment relief mechanism for persons whose identities have been stolen and falsely used by another person in a criminal proceeding. *See* 15 M.R.S. §§ 2181-2184, enacted by P.L. 2009, ch. 287, § 1, effective September 12, 2009. For a thorough explanation of this new relief mechanism, *see* L.D. 1179, Summary (124th Legis. 2009). In essence, the new law provides a basis for relief when a person, claiming another person's identity, has been convicted of a crime or civil infraction, and the person seeking relief had no knowledge that his or her identity was used by the convicted person. The new law is not a new post conviction remedy for persons who have appeared in court and been convicted after trial or plea and later seek to assert defects in the process that led to their identification or claim that an alternative suspect should have been pursued. The statutory amendments authorize post-judgment relief in a criminal proceeding or a civil violation or traffic infraction proceeding. Rules 105-109 address this post-judgment relief mechanism in the context of a criminal proceeding. Rule 60(b) of the Maine Rules of Civil Procedure provides general guidance in the context of a civil violation or traffic infraction proceeding.

Advisory Note—July 2010

M.R. Crim. P. 109. The amendment corrects a typographical error.